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Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor

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SHELTERING THE HOMELESS: JUDICIAL ENFORCEMENT OF GOVERNMENTAL DUTIES TO THE POOR

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INTRODUCTION

Lacking the basic necessities of life, health, and safety, homeless people in America are the poorest of the poor. Many states have imposed upon themselves or their political subdivisions the duty to care for poor inhabitants. This article explores the enforceability of these governmental duties as a means of obtaining assistance for the homeless.

Who are the homeless of this country? Their unifying characteristic is a lack of permanent residence,[1] although a broad definition includes persons living in unsafe or unsanitary housing.[2] In addition to the stereotypic alcoholic man and bag lady, homeless people include growing numbers of poor women, children, and families; unemployed able-

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1. Erickson & Wilhelm, *Introduction*, in HOUSING THE HOMELESS xix, xxvii (J. Erickson & C. Wilhelm eds. 1986) [hereinafter HOUSING THE HOMELESS]; U.S. Dep't of Health & Human Services, *Program Design and Management*, in HOUSING THE HOMELESS, *supra*, at 389.

2. *See, e.g.*, Graham v. Schoemehl, No. 854-00035 (Mo. Cir. Ct. Nov. 15, 1985) (consent decree).

bodied men; physically and mentally disabled persons; and battered and abused women.[3]

Those who study homelessness attribute its existence to several major factors: general economic conditions and unemployment,[4] reductions in government benefits,[5] deinstitutionalization of mental patients,[6] shortages of low-cost housing,[7] and family breakdown and domestic violence.[8]

As characteristics of the homeless population and causes of homelessness vary, so do the needs of homeless people. Their common need is shelter—a temporary or permanent residence.[9] Homeless people also need relief from many other problems. They are likely to suffer from inadequate food and nutrition, a clothing shortage, physical violence and sexual victimization, poor physical and mental health, alcoholism or alcohol abuse, and inadequate job and life skills.[10]

Efforts to ameliorate the problems of the homeless focus on either prevention or short- and long-term cures.[11] This article deals with one

3. Kaufman, *Homelessness: A Comprehensive Policy Approach*, in HOUSING THE HOMELESS, *supra* note 1, at 336; Sexton, *The Life of the Homeless*, in HOUSING THE HOMELESS, *supra* note 1, at 76-77; U.S. Dep't of Health & Human Services, *supra* note 1, at 389. Estimates of the number of homeless in the United States range from 250,000 to 3,000,000. Erickson & Wilhelm, *supra* note 1, at xix.

4. Erickson & Wilhelm, *supra* note 1, at xxiii; Bassuk, *The Homeless Problem*, in HOUSING THE HOMELESS, *supra* note 1, at 254; Hope & Young, *The Politics of Displacement: Sinking into Homelessness*, in HOUSING THE HOMELESS, *supra* note 1, at 107.

5. Erickson & Wilhelm, *supra* note 1, at xxiv; Bassuk, *supra* note 4, at 254; Hope & Young, *supra* note 4, at 107-09.

6. Collin, *Homelessness: The Policy and the Law*, 16 URB. LAW. 317, 318 (1984); Erickson & Wilhelm, *supra* note 1, at xxiv; Bassuk, *supra* note 4, at 254; Hope & Young, *supra* note 4, at 107; Kaufman, *supra* note 3, at 336; Stoner, *The Plight of Homeless Women*, in HOUSING THE HOMELESS, *supra* note 1, at 280.

7. Erickson & Wilhelm, *supra* note 1, at xxiv-xxv; Bassuk, *supra* note 4, at 254; Kaufman, *supra* note 6, at 336; Stoner, *supra* note 6, at 280.

8. Erickson & Wilhelm, *supra* note 1, at xxv; Stoner, *supra* note 6, at 280.

9. "Homeless men and women suffer from multiple problems in addition to their lack of housing, but providing decent shelter remains the crucial first step in the process of returning stability and dignity to their lives." Sloss, *The Crisis of Homelessness: Its Dimensions and Solutions*, 17 URB. & SOC. CHANGE REV. 18 (1984). "Stated simply, *being homeless*, in and of itself, is the most fundamental and critical problem of homelessness." G. Morse, Homelessness: A Multilevel Assessment and Intervention Strategy 89 (Sept. 30, 1984) (specialty paper) (emphasis in original).

10. Morse, *supra* note 9, at 90-91; U.S. Dep't of Health & Human Services, *supra* note 1, at 389.

11. Policy or program options to help the homeless generally fall within four areas:

curative strategy: litigation. Litigation aimed primarily at the immediate and life-threatening problems of the homeless—the need for shelter, food, clothing, personal security, and health care—is only one of many ways to approach the problem. This is not a complete solution because litigation cannot fully address the many causes of homelessness.[12] Litigation takes time, and the implementation of judicially imposed remedies can be difficult.[13] Private nongovernmental efforts[14] and legislative approaches[15] may provide additional solutions.

Despite the limitations of litigation, several recent lawsuits brought in state courts by and on behalf of homeless people produced positive results.[16] Courts have recognized and enforced governmental duties under state law to provide shelter and other life-sustaining services to those who need them. Moreover, lawsuits raise the public consciousness and attract the attention of public officials.[17]

Part I of this article examines the general principles involved in state

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prevention; short-term emergency shelter and other life and health sustaining services; transitional services such as long-term residential placement, health care, employment training and assistance, and permanent housing search; and permanent housing. Erickson & Wilhelm, *supra* note 1, at xxvii-xxix.

12. Collin, *supra* note 6, at 328; Fabricant & Epstein, *Legal and Welfare Rights Advocacy: Complementary Approaches in Organizing on Behalf of the Homeless*, 17 URB. & SOC. CHANGE REV. 15, 17-19 (1984). Some litigation efforts, however, have focused on the causes of homelessness. *See* HOMELESSNESS TASK FORCE, HOMELESSNESS IN AMERICA: A LITIGATION MEMORANDUM FOR LEGAL SERVICES ADVOCATES (July 1986) (distributed by National Clearinghouse for Legal Services, Inc.).

13. Collin, *supra* note 6, at 325; Fabricant & Epstein, *supra* note 12, at 16.

14. *See* Fabricant & Epstein, *supra* note 12, at 17-19; Gillerman, *County to Get First Shelter for Homeless*, St. Louis Post-Dispatch, Mar. 3, 1986, at 3W.

15. *See* Collin, *supra* note 6, at 328-29; *but see* Birkinshaw, *Homelessness and the Law—the Effects and Response to Legislation*, 5 URB. L. & POL'Y 255 (1982) (describing the limited success of England's Housing (Homeless Persons) Act of 1977).

16. *See infra* notes 114-85 and accompanying text. "In New York city, litigation has proven to be a uniquely effective tool in promoting the cause of homeless men and women." Hopper & Cox, *Litigation in Advocacy for the Homeless*, in HOUSING THE HOMELESS, *supra* note 1, at 305. *See also* Stille, *Seeking Shelter in the Law*, Nat'l L.J., Feb. 10, 1986, at 1.

17. *See* Collin, *supra* note 6, at 328; Sloss, *supra* note 9, at 19-20. Sloss states:

> Developing political power and establishing legal precedents have been important to poor people's struggles for civil rights and economic justice, and the case of the homeless is no different. . . .
>
> In the absence of legal decisions establishing the rights of homeless to decent homes, all levels of government can turn their backs on the homeless as they have done in the past. . . . "[N]othing moves city administrators quite like the threat of a suit."

Id.

court actions to enforce individual rights against government entities and officials. It also discusses the justiciability issues that often arise when the judiciary is called on to review and remedy the conduct of another branch of government. In the context of homeless litigation, the resolution of these issues plays a significant role in determining whether courts will reach the merits of a claim, and if so, how far they will go in fashioning relief. Part II explores state constitutional and statutory provisions that establish governmental duties to relieve the poor, and examines private litigation efforts to enforce the rights created by those provisions. In Part III, this article analyzes litigation that has been pursued under those state poor laws by homeless people seeking shelter and other services from government defendants. This article concludes in Part IV with suggested approaches to the justiciability issues and remedial questions that often arise in homeless litigation.

I. STATE COURT ENFORCEMENT OF GOVERNMENTAL DUTIES IN GENERAL

A person seeking to challenge the action or inaction of a state or local government official or entity must resort to one of the extraordinary writs such as injunction and mandamus, unless a procedure for judicial review is prescribed by statute.[18] This part will discuss the general requirements for those remedies and the limits on judicial authority to interfere with the functions of other branches of government.

A. *Requirements for Mandatory Injunctive Relief Against State or Local Governments*

The general principles that state courts apply, or at least articulate, in deciding whether to grant injunctive relief are well settled. The decision whether to grant an injunction lies within the discretion of the court. In making this decision, however, the court must adhere to the general principles of equity, taking into account the facts and circumstances of each case.[19]

In general, a plaintiff seeking an injunction must establish four elements: (1) a violation of a clear legal right, or an imminent threat of

18. D. MANDELKER, D. NETSCH & P. SALSICH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 767 (2d ed. 1983).

19. *See* Hudson v. School Dist., 578 S.W.2d 301, 311 (Mo. Ct. App. 1979). *See also* State *ex rel.* Danforth v. W.E. Constr. Co., 552 S.W.2d 72 (Mo. Ct. App. 1977).

such violation; (2) threat of irreparable injury; (3) no adequate remedy at law; and (4) a balance of equities in his or her favor.[20] Even in cases in which a plaintiff establishes these four elements, a court may refuse injunctive relief if it is not in the public interest.[21]

Courts frequently distinguish between mandatory and prohibitory injunctions. A mandatory injunction compels the performance of an action or duty, while a prohibitory injunction requires that one refrain from performing a particular action or duty.[22] Courts are generally reluctant to issue mandatory injunctions,[23] particularly when the defendant is a government entity or official. Courts sometimes state a general rule that they will not issue injunctions to regulate the manner and method of performance of official duties[24] and will not enjoin government entities or officials in the exercise of their discretionary powers.[25] This reluctance is important in homeless cases in which the preferred relief is usually a mandatory injunction directed against a public official. When presented with a justiciable controversy, however, courts issue mandatory injunctions against government entities and officials in two categories of cases: when a public official or gov-

20. *Hudson,* 578 S.W.2d at 312; J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS Ch. I §§ 8, 9, 22, 28 (4th ed. 1905).

21. J. HIGH, *supra* note 20, Ch. I.

22. *See* Barton v. Eichelberger, 311 F. Supp. 1132 (D. Pa. 1970), *aff'd,* 451 F.2d 263 (3d Cir. 1971); Singleton v. Anson County Bd. of Educ., 283 F. Supp. 895 (W.D.N.C. 1968); J. HIGH, *supra* note 20, Ch. I § 2.

The distinction between mandatory and prohibitory injunctions is not always clear. A court may order a defendant to stop something, such as a nuisance, when the defendant must actually take positive action to comply with the court order. United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977).

23. *See, e.g., Hudson,* 578 S.W.2d at 312; Board of Educ. v. Pomeroy, 47 Ill. App. 3d 468, 474, 362 N.E.2d 55, 60 (1977). As is the case with a prohibitory injunction, the decision to grant or deny relief in the form of a mandatory injunction rests within the court's discretion. *Id.* at 474, 362 N.E.2d at 60. A court will not issue a mandatory injunction if the defendant could not comply with it. *Hudson,* 578 S.W.2d at 312 n.1 (citing Hribernik v. Reorganized School Dist. R-3, 276 S.W.2d 596 (Mo. Ct. App. 1955)).

24. *See* Texas Dep't of Mental Health & Mental Retardation v. Wade, 651 S.W.2d 927, 929 (Tex. Ct. App. 1983); *see also* Rocke v. County of Cook, 60 Ill. App. 3d 874, 377 N.E.2d 287 (1978).

25. *See* Evans v. Just Open Gov't, 242 Ga. 834, 836, 251 S.E.2d 546, 549 (1979); City of Hammond v. N.I.D. Corp., 435 N.E.2d 42, 48 (Ind. Ct. App. 1982); Weber v. City of Sachse, 591 S.W.2d 563, 566 (Tex. Civ. App. 1979); J. HIGH, *supra* note 20, Chs. XXI § 1240, XXII § 1326.

ernment entity fails to perform a non-discretionary duty,[26] and when the defendant's conduct amounts to an abuse of discretion.[27]

B. *Requirements for Mandamus Against State or Local Government Officials*

A writ of mandamus is a legal remedy that compels a government official to perform a duty imposed by law.[28] Although it is a legal remedy, the principles of equity usually govern a proceeding for a writ of mandamus.[29] The basic requirements for obtaining a writ of mandamus are a clear legal right on the part of the plaintiff, a corresponding duty that the defendant must perform, and the absence of an alternative remedy at law.[30] Traditionally, mandamus was available only to compel the performance of ministerial acts and duties.[31] Although there may be some ambiguities in the term, a ministerial act is an act that a government official must perform in a prescribed manner when certain circumstances are present, without regard to the official's judgment or discretion.[32]

When governmental action is mandatory and involves the exercise of discretion, mandamus may compel a public official to act, but it is not available to dictate the particular action the official must take.[33] Like an injunction, however, a plaintiff may use mandamus when a public

26. *See, e.g.,* Adams v. Nagle, 303 U.S. 532 (1983); *Weber,* 591 S.W.2d at 567; J. HIGH, *supra* note 20, Ch. XXII § 1310.

27. *See infra* notes 46-50 and accompanying text.

28. *See* Huser v. Duck Creek Watershed (Joint) Dist. No. 59, 234 Kan. 1, 4, 668 P.2d 172, 176 (1983); Sutton v. Figgatt, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971); J. HIGH, *supra* note 20, Ch. XXII § 1310.

29. *See* Orange County v. North Carolina Dep't of Transp., 46 N.C. App. 350, 385, 265 S.E.2d 890, 913 (1980). *See also* 42 AM. JUR. 2D *Injunctions* § 19 (1969).

30. *See* County of Allegheny v. Commonwealth, 85 Pa. Commw. 73, 76, 480 A.2d 1330, 1331 (1984).

31. *See* Klostermann v. Cuomo, 61 N.Y.2d 525, 539, 463 N.E.2d 588, 595, 475 N.Y.S.2d 247, 254 (1984); *but cf.* Legal Aid Soc'y v. Scheinman, 53 N.Y.2d 12, 16 n.1, 422 N.E.2d 542, 544 n.1, 439 N.Y.S.2d 882, 884 n.1 (1981); Board of Educ. of Niles Township High School Dist. No. 219 v. Board of Educ. of Northfield Township High School Dist. No. 225, 112 Ill. App. 3d 212, 219, 445 N.E.2d 464, 470 (1983).

32. *See Huser,* 232 Kan. at 4, 668 P.2d at 176; Oyler v. State, 618 P.2d 1042, 1048-49 (Wyo. 1980).

33. *See* Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 636-37, 240 S.E.2d 460, 470 (1977); County of Allegheny v. Commonwealth, 85 Pa. Commw. 73, 76, 480 A.2d 1330, 1332 (1984).

official has abused his or her discretion.[34]

An important difference between a mandatory injunction and a writ of mandamus is an injunction's ability to prescribe a detailed course of action. In homeless litigation, either remedy can be issued to order governments to comply with their legal duties to the poor, but only an injunction can provide detailed directives ordering governments what to do and how to do it.[35]

C. *Limits on Judicial Authority to Intrude into Matters Entrusted to Other Branches of Government*

When plaintiffs ask courts to intrude in areas involving the conduct of government officials, as in homeless litigation, courts sometimes hold that they lack subject matter jurisdiction. These courts articulate one or more of the overlapping doctrines of separation of powers, justiciability, sovereign immunity, or political question as the basis for such a result.[36] The issue can arise at the liability stage or the relief stage of litigation. At the liability stage, a government might assert that the challenged conduct is not subject to judicial review because it involves the exercise of discretion. At the relief stage, plaintiffs might

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34. Many courts have indicated that no practical difference exists between the remedies of injunction and mandamus. *Sutton*, 280 N.C. at 92, 185 S.E.2d at 98 (1971); West v. Board of County Comm'rs, 373 So. 2d 83, 86 n.4 (Fla. Dist. Ct. App. 1979); Monroe v. Middlebury Conservation Comm'n, 187 Conn. 476, 447 A.2d 1, 3 (1982); *Orange County*, 46 N.C. Ct. App. at 385, 265 S.E.2d at 912-13. In jurisdictions in which the distinction between equity and law is observed, however, significant distinctions may exist between the two remedies. Lyle v. City of Chicago, 357 Ill. 41, 191 N.E. 255, 256-57 (1934). Some courts express the view that mandamus is available to compel performance or cure a default, while an injunction is the appropriate remedy to restrain action or to prevent threatened or anticipated harm. *Id.* In some states mandamus is considered a remedy at law that precludes the issuance of an injunction. Board of Educ. v. Pomeroy, 47 Ill. App. 3d 468, 474, 362 N.E.2d 55, 60 (1977).

35. *See infra* notes 58-70 and accompanying text.

36. For example, the court asserted separation of powers as a basis for lack of jurisdiction or denial of relief in Lap v. Thibault, 348 So. 2d 622 (Fla. Dist. Ct. App. 1977); Texas Dep't of Mental Health & Mental Retardation v. Wade, 651 S.W.2d 927, 929-30 (Tex. Ct. App. 1983); and Denver Police Protective Ass'n v. City of Denver, 6 65 P.2d 150, 151 (Colo. Ct. App. 1983). The court in *Klostermann*, 61 N.Y.2d at 536-37, 463 N.E.2d at 594-94, 475 N.Y.S.2d at 252-53, dealt with the doctrines of justiciability, separation of powers, and political question. The defendants argued that sovereign immunity barred judicial intrusion into matters committed to the discretion of government officials in Houseknecht v. Zagel, 112 Ill. App. 3d 284, 289-90, 445 N.E.2d 402, 406 (1983), and *Orange County*, 46 N.C. App. at 377-38, 265 S.E.2d at 908-09. *See also infra* notes 37-45 and accompanying text (discussion of doctrines of justiciability, separation of powers, and political question).

ask a court to order a public official to act in a particular way. A government might then argue that the nature of the relief sought will require the court to make choices it lacks the authority or the competence to make.

1. Judicial Review of Discretionary Official Conduct

When the challenged governmental action involves the exercise of discretion, a court must determine whether the issues are justiciable. The principle that courts should not intrude into areas committed to the coordinate branches of government is part of the concept of justiciability and central to the separation of powers doctrine.[37] This principle, known as the political question doctrine, is an aspect of justiciability that arises in cases involving the enforceability of rights against officials or departments of the legislative or executive branches.[38] Courts' refusal to resolve political questions stems from both the separation of powers doctrine and the courts' general unwillingness to get involved in areas in which they lack competence.[39]

Though a substantial disagreement exists over the scope, rationale, and existence of the political question doctrine,[40] courts rely on it in determining whether to exercise jurisdiction.[41] The United States Supreme Court's decision in *Baker v. Carr*[42] stands as a basic exposition of the political question doctrine.[43] According to *Baker*, courts should not decide questions that the Constitution explicitly commits to another branch of government, that require the application of standards or the determination of policy choices not suited to judicial deci-

37. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-7 (1987). Professor Tribe indicates that the concept of justiciability is derived from the constitutional limitation on judicial power, and implicates both the necessity for an adversary and judicially resolvable controversy and the separation of powers doctrine. *Id.* State governmental power is divided among the same three branches as those found in the federal government.

38. L. TRIBE, *supra* note 37, § 3-16; C. WRIGHT, THE LAW OF THE FEDERAL COURTS § 14 (4th ed. 1983).

39. *See* Baker v. Carr, 369 U.S. 186, 217 (1962); L. TRIBE, *supra* note 37, § 3-16; C. WRIGHT, *supra* note 38, § 14.

40. *See* C. WRIGHT, *supra* note 38, § 14; Redish, *Judicial Review and the "Political Question"*, 79 NW. U.L. REV. 1031 (1985).

41. Redish, *supra* note 40, at 1032-33.

42. 369 U.S. 186 (1962).

43. *Id.* at 217. *See* Davis v. Bandemer, 206 S. Ct. 2797 (1986); Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860 (1986); L. TRIBE, *supra* note 37, § 3-16; C. WRIGHT, *supra* note 38, § 14.

sion-making, or that would lead to unnecessary and undesirable conflict with another branch.[44] Since *Baker*, few courts have invoked the political question doctrine as a bar to jurisdiction.[45] Nevertheless, the political question doctrine is often an issue in homeless cases.

After a court determines that it has jurisdiction to review a government official's discretionary conduct, the usual standard of review is whether the conduct constitutes an abuse of discretion. A court might identify an abuse of discretion in a variety of ways. Conduct may be an abuse of discretion if it is arbitrary, capricious, or undertaken for untenable reasons;[46] based on a misconception of law;[47] illegal or unconstitutional;[48] outside the authority or beyond the power of the government official;[49] or fraudulent, corrupt, oppressive, or grossly unjust.[50]

A legitimate difference of opinion over statutory interpretation does not render a duty discretionary and, therefore, unenforceable. Clearly it is within the courts' realm "to say what the law is,"[51] and while

44. *Baker*, 369 U.S. at 217; L. TRIBE, *supra* note 37, § 3-16; C. WRIGHT, *supra* note 38, § 14.

45. C. WRIGHT, *supra* note 38, § 14. *See Klostermann*, 61 N.Y.2d at 536-37, 463 N.E.2d at 593-94, 475 N.Y.S.2d at 252-53 (justiciability and political question do not bar action to enforce individual statutory rights).

46. *See, e.g., Houseknecht*, 112 Ill. App. 3d at 291, 445 N.E.2d at 407; Clear Lake City Water Auth. v. Winograd, 695 S.W.2d 632, 642 (Tex. Ct. App. 1985); Rocke v. County of Cook, 60 Ill. App. 3d 384, 377 N.E.2d 287 (1978); *see also* Southern Illinois Asphalt v. Pollution Control Bd., 60 Ill. 2d 204, 326 N.E.2d 406 (1975); Dorfman v. Gerber, 29 Ill. 2d 191, 193 N.E.2d 770 (1963); Shadid v. Oklahoma Alcoholic Beverage Control Bd., 639 P.2d 1239, 1242 (Okla. 1982); Wales v. Tax Comm'n, 100 Ariz. 181, 412 P.2d 472 (1966); Town of Paradice v. Gulf Leisure Corp., 27 Ariz. App. 600, 557 P.2d 532 (1976).

47. *See, e.g.*, County of Allegheny v. Commonwealth, 85 Pa. Commw. 73, 79, 480 A.2d 1330, 1333 (1984).

48. *See, e.g., Clear Lake City Water Auth.*, 695 S.W.2d at 642; Starrett v. Gibson, 168 S.W. 16, 18 (Tex. Civ. App. 1914) (no writ); Texas Dep't of Mental Health & Mental Retardation v. Wade, 651 S.W.2d 927, 929 (Tex. Ct. App. 1983); Godley v. Duval County, 361 S.W.2d 629, 630 (Tex. Civ. App. 1962) (no writ); Marion County v. Perkins Bros. Co., 171 S.W. 789 (Tex. Civ. App. 1914) (no writ); McDowell v. Trustees of Internal Improvement Fund, 90 So. 2d 715, 718 (Fla. 1956).

49. *See, e.g.*, Chapman v. Watson, 40 Ill. 2d 408, 240 N.E.2d 604 (1968); Rivera v. City of Douglas, 132 Ariz. 117, 644 P.2d 271 (Ariz. Ct. App. 1982); Foster v. Thunderbird Irrigation Water Dist., 125 Ariz. 3241, 609 P.2d 594 (Ariz. Ct. App. 1980).

50. *See, e.g.*, Board of Educ. of Niles Township High School Dist. No. 219 v. Board of Educ. of Northfield Township High School Dist. No. 225, 112 Ill. App. 3d 212, 218, 445 N.E.2d 464, 470 (1983); Lap v. Thibault, 348 So. 2d 622 (Fla. 1977).

51. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

courts give deference to executive or legislative interpretations, they often order compliance with a statutory duty as they see it.[52] If a court finds that a general statute mandating aid for the poor requires the provision of shelter, it could order a government to provide shelter despite the government's conflicting interpretation of the statute.

Government officials naturally resist, and the courts are inclined to limit, judicial intrusions into budgetary matters. When an official fails to perform a mandatory duty, however, it is no defense that an order of compliance would require an expenditure of money or that the government lacks the funds to comply fully with the duty.[53] In addition, the mere fact that legislative conduct involves an appropriation of funds does not insulate it from judicial review.[54] These principles are important in homeless cases because the provision of shelter and other services obviously costs money.

2. Judicial Relief Involving Discretionary Choices

When the necessary elements are present for an injunction or writ of mandamus, courts generally limit the extent of the remedy to meet the proven violation. If government defendants fail to provide particular services, a court may order the government to provide those services. The government is then left to determine how to raise the money necessary to comply with the order.[55] When the conduct requiring correction involves a two-dimensional choice such as the grant or denial of a specific benefit, the court can simply order reversal of the improper action.[56] When compliance with a statutory duty involves multidimen-

52. *E.g.,* Kiddy v. Oklahoma City, 576 P.2d 298 (Okla. 1978) (city required to provide interpreter for deaf persons upon arrest); O'Fallon Dev. Co. v. City of O'Fallon, 71 Ill. App. 3d 220, 389 N.E.2d 677 (1979) (city required to remove private advertisement from public water tower).

53. *See* Pingree v. Quaintance, 394 So. 2d 161 (Fla. Dist. Ct. App. 1981); Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 594, 475 N.Y.S.2d 247, 253 (1984); Kiddy v. Oklahoma City, 576 P.2d 298 (Okla. 1978).

54. *See* Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387 (1981).

55. *See, e.g.,* Inverness Forest Improvement Dist. v. Hardy St. Investors, 541 S.W.2d 454 (Tex. Civ. App. 1976); Kiddy v. Oklahoma City, 576 P.2d 298 (Okla. 1978). When plaintiffs seek orders directing particular methods or levels of funding, however, courts often will not provide relief. *Id.*; Weber v. City of Sachse, 591 S.W.2d 563 (Tex. Civ. App. 1979).

56. *See, e.g.,* Mesquite v. Aladdin's Castle, Inc., 559 S.W.2d 92, 95 (Tex. Civ. App. 1977) (issuance of a license improperly denied); O'Fallon Dev. Co. v. City of O'Fallon, 71 Ill. App. 3d 220, 389 N.E.2d 677 (1979) (removal of a private advertisement from public property); Occidental Life Ins. Co. v. Ingram, 34 N.C. App. 619, 240 S.E.2d 460

sional decision-making, however, a court must decide whether and to what extent it may intrude into the discretionary area originally entrusted to a legislative or executive body.[57] In many instances homeless plaintiffs desire relief more detailed than a simple directive such as "provide shelter."

A court has the power to impose a remedy after it determines that a public official is not complying with a complex statutory duty. Noncompliance may consist of either a total failure to perform or an abuse of discretion. In determining what remedy to impose, courts apply general equitable principles.[58] As the Supreme Court stated in *Brown v. Board of Education*,[59] "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."[60]

Over the past three decades federal courts frequently resorted to remedies that intrude deeply into executive and legislative matters.[61] The Supreme Court has recognized the broad remedial powers of the judiciary in these cases: "Once a right and a violation have been shown, the scope of a district court's equity powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[62]

State courts, like federal courts, have relied on their remedial power to bring government defendants into compliance with legal duties.[63]

(1977) (approval of a corporate reorganization plan improperly rejected); Unionville-Chadds Ford School Dist. v. Rotteveel, 87 Pa. Commw. 334, 487 A.2d 109 (1985) (provision of free school transportation improperly withheld).

57. *See* Coffin, *The Frontier of Remedies: A Call for Exploration*, 67 CALIF. L. REV. 983 (1979); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

58. The bases for a court's equitable remedial powers are its constitutional grant of judicial power and the traditional powers of equity. Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 853-54 (1978).

59. 349 U.S. 294 (1955).

60. *Id.* at 300.

61. These intrusions have taken place primarily in school desegregation cases and other institutional litigation. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Coffin, *supra* note 57; Eisenberg & Yeazell, *supra* note 57; Special Project, *supra* note 58.

62. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 15 (1971). The Court has gone so far as to indicate that a district court may order a government to levy taxes to raise the funds necessary to comply with the law. *See* Griffin v. County School Bd., 377 U.S. 218, 233 (1964).

63. *E.g.*, Perez v. Boston Hous. Auth., 379 Mass. 703, 400 N.E.2d 1231 (1980); Wayne County Jail Inmates v. Lucas, 391 Mich. 359, 216 N.W.2d 910 (1974).

For example, in *Perez v. Boston Housing Authority*[64] the court appointed a receiver to assume the functions of the housing authority board after a number of remedial steps proved insufficient to bring defendants into compliance with the state sanitary code.[65] The Supreme Judicial Court of Massachusetts upheld the appointment of a receiver.[66] The court rejected defendants' separation of powers argument, noting that it is a basic function of the judicial branch to remedy violations of laws, including those committed by the executive branch.[67] The court also relied on remedial examples provided by the federal courts in institutional litigation as authority for a court's power to grant intrusive remedies against public officials.[68] Though the court in *Perez* ultimately granted broad relief, it recognized the judicial reluctance to issue mandatory injunctions against government defendants and the principle that such relief should be no more intrusive than necessary.[69] The court nonetheless upheld the imposition of deeply intrusive relief, which confined and ultimately eliminated the discretion originally vested in the defendants, because defendants persisted in their unlawful conduct despite the court's previous attempts to achieve compliance.[70]

64. 379 Mass. 703, 400 N.E.2d 1231 (1980).

65. *Id.*

66. *Id.* at 705, 400 N.E.2d at 1234. Similarly, the Michigan Supreme Court upheld a detailed injunction and the appointment of a monitor to remedy the conditions at a jail in *Wayne County*, 391 Mich. at 365-66, 216 N.W.2d at 912-13.

67. 379 Mass. at 739, 400 N.E.2d at 1252. The court stated: "To the contrary, when the executive persists in indifference to, or neglect or disobedience of court orders, necessitating a receivership, it is the executive that could more properly be charged with continuing the separation principles." *Id.* at 739-40, 400 N.E.2d at 1252. *See also Wayne County*, 391 Mich. at 365, 216 N.W.2d at 912.

68. 379 Mass. at 729-30, 400 N.E.2d at 1247.

69. *Id.* at 729-30, 400 N.E.2d at 1247. *See also* Special Project, *supra* note 58, at 864.

70. Perez v. Boston Hous. Auth., 379 Mass. 703, 733-34, 400 N.E.2d 1231, 1249 (1980). "[A]s injunctions meet with indifference or violation on the part of the defendant officials, there is justification for the more detailed directions further confining or eliminating discretion. . . . The rule of thumb may be that the more indurated the violations of law and the remedial injunction, the more imperative and controlling the later superseding injunction." *Id.*

II. STATE COURT ENFORCEMENT OF GOVERNMENTAL DUTIES TO THE POOR

A. *Source and Scope of Rights and Duties*

There is no common law duty to support the poor, but states have undertaken a duty to care for their poor inhabitants. States have done so by either adopting constitutional provisions or enacting statutes. The New York Constitution provides an example: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[71] The plain language of this section imposes an affirmative duty upon the state to care for its needy. Recognizing this duty, the New York Court of Appeals stated that "assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution."[72]

The most common source of a duty to relieve the poor is found in state statutes. Though the specific terms of the statutes vary considerably, common themes recur. The statutes typically begin by identifying the government entity or official that is responsible for providing relief. The duty is usually imposed on cities or counties,[73] townships,[74] municipalities,[75] or special welfare districts.[76] The administration of the

71. N.Y. CONST. art. XVII, § 1. Homeless plaintiffs in New Jersey have argued that the New Jersey Constitution establishes a right to emergency shelter. That paragraph provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, para. 1. The court in Maticka v. Atlantic City, No. L-8306-84E (N.J. Super. Ct. Jan. 29, 1985), declined to rule on plaintiffs' constitutional claim because it found a right to shelter in the state statute. *See also* MONT. CONST. art. XII, § 3(3): "The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune, have need for the aid of society."

72. Tucker v. Toia, 43 N.Y.2d 1, 7, 371 N.E.2d 449, 451, 400 N.Y.S.2d 728, 730 (1977); *see also* Lee v. Smith, 43 N.Y.2d 453, 373 N.E.2d 247, 402 N.Y.S.2d 351 (1977). According to the *Tucker* court, the constitutional provision is intended to serve two functions: to prevent constitutional attack on the state's social welfare programs, and to provide a clear statement of the positive duty imposed on the state to care for the needy. 43 N.Y.2d at 7, 371 N.E.2d at 451, 400 N.Y.S.2d at 730.

73. *See, e.g.*, CAL. WELF. & INST. CODE § 17,000 (Deering 1985); MO. REV. STAT. § 205.580 (1978); OHIO REV. CODE ANN. § 5113.02 (Baldwin 1964).

74. *See, e.g.*, IND. CODE § 12-2-1-6 (1976).

75. *See, e.g.*, N.J. STAT. ANN. § 44:8-120 (West Supp. 1986); WIS. STAT. § 49.02(1) (1971).

76. *See, e.g.*, N.Y. SOC. SERV. LAW § 62 (McKinney 1983).

relief programs may be vested in a board of supervisors,[77] a director of welfare,[78] an overseer of the poor,[79] or social services officials.[80]

When state legislatures have created a statutory duty to relieve the poor, they frequently use the word "shall" to clarify the mandatory nature of the duty.[81] The actual terms of the duty vary from statute to statute. The statutes typically begin with vague, general language such as the duty to "maintain," "support," "provide," "care for," or "relieve."[82] Some statutes do no more than set forth those broad terms[83] while others explicitly state what services and necessities of life the government must provide.[84]

The statutes often limit the duty to support the poor. Most frequently these limitations include residency requirements,[85] availability of funds,[86] and the absence of any person (such as a relative) able or

77. CAL. WELF. & INST. CODE § 17,001 (Deering 1985).

78. N.J. STAT. ANN. § 44:8-120 (West Supp. 1986).

79. *See, e.g.,* IND. CODE § 12-2-1-6 (1976).

80. N.Y. SOC. SERV. LAW § 131.1 (McKinney 1983).

81. *See supra* notes 71-78 and accompanying text.

82. *Id.*

83. For example, MO. REV. STAT. § 205.580 (1978) states: "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

84. For example, N.J. STAT. ANN. § 44:8-122 (West Supp. 1986) provides:

> The director of welfare, by a written order, shall render such aid and material assistance as he may in his discretion, after reasonable inquiry, deem necessary to the end that such person may not suffer unnecessarily, from cold, hunger, sickness, or be deprived of shelter pending further consideration of the case.

Id.

Providing even greater specificity, WIS. STAT. § 49.01(1) (1971) states:

> "Relief" means such services, commodities or money as are reasonable and necessary under the circumstances to provide food, housing, clothing, fuel, light, water, medicine, medical, dental, and surgical treatment (including hospital care), optometrical services, nursing, transportation, and funeral expenses, and include wages for work relief. The food furnished shall be of a kind and quantity sufficient to provide a nourishing diet. The housing provided shall be adequate for health and decency. Where there are children of school age the relief furnished shall include necessities for which no other provision is made by law. The relief furnished, whether by money or otherwise, shall be at such times and in such amounts, as will in the discretion of the relief official or agency meet the needs of the recipient and protect the public.

Id. See also IND. CODE § 12-2-1-6 (1976); MINN. STAT. ANN. § 256D.02(4) (West 1982 & Supp. 1986); OHIO REV. CODE ANN. § 5113.01 (Baldwin 1964).

85. *E.g.,* CAL. WELF. & INST. CODE § 17,000 (Deering 1985); MO. REV. STAT. § 205.600 (1978); MINN. STAT. ANN. § 256D.03 (West 1982 & Supp. 1986); OHIO REV. CODE ANN. § 5113.05 (Baldwin 1964).

86. *E.g.,* CAL. WELF. & INST. CODE § 17,000 (Deering 1985).

statutorily required to care for the poor person.[87]

B. *Enforcement of General Governmental Duties to the Poor*

Litigation brought by poor persons to enforce rights established by state law can be divided into two categories: challenges to a complete denial of benefits and challenges to the nature or amount of benefits. In denial-of-benefits cases plaintiffs generally seek judicial review of a government's grounds for denial. Defendant officials may argue that determination of eligibility is left to their discretion and is not subject to judicial review. A court that reviews a denial of benefits and finds that defendants acted improperly, however, should have no difficulty choosing and implementing an appropriate remedy, because the grant or denial of benefits is a two-dimensional choice.

The level-of-benefits cases are quite different. In these cases a court must first decide whether it can review the official's determination of the nature and amount of benefits. If the court undertakes review and finds a violation of duty, a wide range of potential remedies becomes available. Remedial orders in these cases range from an order requiring defendants to make a new determination of benefits to a court-imposed determination of the same benefits.

1. Judicial Review in Denial-of-Benefits Cases

Through the exercise of their discretionary power in implementing welfare programs, local government entities occasionally declare various categories of poor people ineligible for public assistance, despite a general statutory duty to aid all of those in need. In many instances, however, courts have reversed eligibility limitations.[88] Even though

87. *Id.*; *see also* N.Y. SOC. SERV. LAW § 131.1 (McKinney 1983) and MO. REV. STAT. § 205.590 (1978) (arguably not a limitation—*see infra* note 131).

88. *See* Bernhardt v. Alameda County Bd. of Supervisors, 58 Cal. App. 3d 806, 130 Cal. Rptr. 189 (1976); Mooney v. Pickett, 4 Cal. 3d 669, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971); *see also* Tucker v. Toia, 43 N.Y.2d 2, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977); Page v. City of Auburn, 440 A.2d 363 (Me. 1982); State *ex rel.* Arteaga v. Silverman, 56 Wis. 2d 110, 201 N.W.2d 538 (1972); State *ex rel.* Sell v. Milwaukee County, 65 Wis. 2d 219, 222 N.W.2d 592 (1974); State *ex rel.* Tiner v. Milwaukee County, 81 Wis. 2d 77, 250 N.W.2d 393 (1977).

Litigation involving the Wisconsin poor relief statute, WIS. STAT. § 49.01-.61 (1971), provides a good example of the limits of official discretion to determine eligibility for benefits. The general relief provision states: "Every municipality shall furnish relief to all eligible dependent persons therein and shall establish or designate an official or agency to administer the same. . . ." WIS. STAT. § 49.02(1) (1971). This statute's language makes it clear that the duty it imposes is affirmative and mandatory. Wisconsin

the constitutional and legislative provisions that mandate support for the poor grant broad discretion to government officials, that discretion is limited and may be reviewed by the courts.[89] Courts state a general rule that legislation establishing rights and duties relating to the poor must be liberally construed to achieve its remedial purpose.[90] Accordingly, counties and municipalities responsible for implementing welfare programs cannot exclude, for theoretical reasons, any particular class of individuals.[91] Instead, they must base their decisions on the needs of individual applicants without regard to potential income sources that

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courts apparently agree. The Wisconsin courts recognized both in 1879 and 1977 that the primary liability and duty to support the poor is on the county (now, municipality). Wisconsin counties (municipalities) do not furnish relief as a matter of right, but they have a clear duty to do so by virtue of the statute and its predecessors. Mappes v. Iowa County, 47 Wis. 31, 1 N.W. 359 (1879); State *ex rel.* Tiner v. Milwaukee County, 81 Wis. 2d 277, 260 N.W.2d 393 (1977). Ashland County v. Bayfield County, 246 Wis. 315, 318, 16 N.W.2d 809, 810 (1944); State *ex rel.* Tiner v. Milwaukee County, 65 Wis. 2d 219, 222 N.W.2d 592, 594 (1974). The coverage of the statute is very broad. The term "dependent person" refers to "a person without the present available money or income or property or credit, or other means by which the same can be presently obtained, sufficient to provide the necessary commodities and services specified in [the subsection defining relief] . . . ." WIS. STAT. § 49.01(2) (1971).

89. *See Bernhardt*, 58 Cal. App. 3d at 811, 130 Cal. Rptr. at 192; *Mooney*, 4 Cal. 3d at 678-79, 483 P.2d at 1237, 94 Cal. Rptr. at 285-87; Tucker v. Toia, 43 N.Y.2d 1, 8-9, 371 N.E.2d 449, 452, 400 N.Y.S.2d 728, 731 (1977); State *ex rel.* Arteaga v. Silverman, 56 Wis. 2d 110, 201 N.W.2d 538, 541 (1972).

The Wisconsin Supreme Court held that when a municipality fails to perform its statutory obligation to provide benefits to the poor, a writ of mandamus is the proper remedy to compel performance. *Arteaga*, 56 Wis. 2d at 115-17, 201 N.W.2d at 541; State *ex rel.* Sell v. Milwaukee County, 65 Wis. 2d 219, 222 N.W.2d 592, 594 (1974).

An attorney general opinion states that the duty is specifically extended to city officials who could be criminally prosecuted for refusing or willfully neglecting to perform the duty. 17 Op. Att'y. Gen. 147 (1928).

90. *See* Mooney v. Pickett, 4 Cal. 3d 669, 676 n.8, 483 P.2d 1231, 1236 n.8, 94 Cal. Rptr. 279, 284 n.8 (1971). *See also infra* note 109 and accompanying text.

91. For example, courts have determined that theoretical employability without an actual job opportunity, or the fact that an individual lost or quit a job, are not valid criteria for denying aid to those in need. *See* Mooney v. Pickett, 4 Cal. 3d 669, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971); Page v. City of Auburn, 440 A.2d 363 (Me. 1982); State *ex rel.* Arteaga v. Silverman, 56 Wis. 2d 110, 201 N.W.2d 538 (1972). Similarly, courts have held that young adults (those between the ages of 18 and 21) cannot be subjected to more rigorous eligibility standards than others applying for economic relief when those standards effectively exclude needy persons. *See* Tucker v. Toia, 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977); Bernhardt v. Alameda County Bd. of Supervisors, 58 Cal. App. 3d 806, 130 Cal. Rptr. 189 (1976); *see also* State *ex rel.* Sell v. Milwaukee County, 65 Wis. 2d 219, 222 N.W.2d 572 (1974); State *ex rel.* Tiner v. Milwaukee County, 81 Wis. 2d 77, 250 N.W.2d 393 (1977).

may not exist.[92]

92. In *Arteaga*, 56 Wis. 2d at 112-13, 201 N.W.2d at 539, the petitioner sought to compel welfare officials of Milwaukee County to provide him with general relief. The officials had denied relief on the ground that the petitioner had willingly terminated his employment. *Id.* at 113, 201 N.W.2d at 541. The court relied on the statutory definition of "dependent person," which refers to "*present* available money . . . or other means by which the same *can be presently* obtained. . . ." *Id.* (emphasis in original). The court stated that the determination of whether an applicant for relief is a "dependent person" is a question of fact that is not left to the discretion of the welfare officials. *Id.* In making this factual determination, welfare officials had no authority to rely on the applicant's past conduct. Instead, "[i]t is petitioner's present condition of being unable to provide for himself the necessities of life that classifies him as a 'dependent person' and entitles him to relief." 56 Wis. 2d at 115-17, 201 N.W.2d at 541. The court held that the single voluntary termination of employment by the petitioner was an insufficient ground to deny him general relief, and remanded the case ordering the lower court to issue the writ of mandamus. *Id.* at 117-18, 201 N.W.2d at 542. In reaching its result, the court relied, in part, on WIS. STAT. § 49.02 (1971). This section states that relief payments can be discontinued for failure to accept a bona fide offer of employment or inadequate job performance once hired. The *Arteaga* court construed this section to apply as "a condition for continued eligibility for general relief, not a bar to initial eligibility." 56 Wis. 2d at 117-18, 201 N.W.2d at 542. The court read the section to indicate that relief would be discontinued if a pattern of voluntary terminations developed. *Arteaga*, therefore, held that a single, voluntary termination did not establish the requisite pattern. *Id.* In 1974 the Wisconsin Supreme Court reaffirmed that a pattern of voluntary terminations may be sufficient reason for the relief agency to refuse relief. State *ex rel.* Sell v. Milwaukee County, 65 Wis. 2d 219, 222 N.W.2d 592 (1974). Furthermore, one court has declared that an administrative rule, under which applicants who had lost two jobs within the past twelve months were deemed unwilling to work, violated due process by creating an impermissible, irrebuttable presumption that the applicants were presently unwilling to work. Garcia v. Silverman, 393 F. Supp. 590 (E.D. Wis. 1975). Section 49.02 was revised, however, in 1983 to include language that both recipients and applicants must comply with the work-seeking rules of the agency. As of this writing, no cases have interpreted the new language. Its impact on *Arteaga* and the other decision is, therefore, uncertain.

The Wisconsin Supreme Court followed *Arteaga* in at least two cases by invalidating other eligibility requirements that went beyond those set forth in the statute. *State ex rel. Sell v. Milwaukee County* involved an administrative rule that required applicants to sell or surrender the title to their motor vehicles. 65 Wis. 2d at 221, 222 N.W.2d at 593. Petitioners sought a writ of mandamus compelling the county to provide relief pursuant to statutory mandate. Relying on the general language of the statute, the court concluded that the "surrender rule" established "an unauthorized and illegal prerequisite to the exercise by welfare authorities of their statutory duty to determine whether or not a person seeking temporary assistance is, in fact, a dependent person and eligible for relief." *Id.* at 223-24, 222 N.W.2d at 594. The court reiterated that the issue of whether or not an applicant was a "dependent person" was a question of fact not left to the discretion of the welfare officials. *Id.* at 224, 222 N.W.2d at 595. The court further noted that though the amount and type of assistance was within the officials' discretion, the only test for determining an applicant's entitlement to relief is whether his need is greater than his "presently available" assets. If the need exceeds the assets, the government must provide relief. *Id.* The court recognized that the statute does not require

2. Judicial Review and Remedies in Level-of-Benefits Cases

When plaintiffs challenge the nature or amount of government welfare benefits, courts are less likely to intervene.[93] In level-of-benefits

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applicants to have no assets, and that welfare officials may consider available, salable assets in determining the amount of aid necessary. The ownership of assets, however, cannot serve as an automatic bar to assistance. Assistance is barred only when the value of the assets exceeds the "level of need." *Id.* The court held that the administrative rule was invalid because it imposed requirements beyond those found in the statute, and remanded the case so that "the lower court can issue a writ of mandamus compelling [the county] to determine plaintiffs' dependency in fact [under the statute], and to furnish relief to plaintiffs if they so qualify." *Id.* at 228, 222 N.W.2d at 597. The dissent objected to invalidating the rule in part on the ground that funds intended to provide the necessities of life would instead be used to run plaintiff's vehicle. As the dissenting judge eloquently noted:

> Money paid by the public to put cornflakes on the table and milk in the stomachs of the children will be spent to put gasoline in the tank and rubber on the wheels. . . . The wife and children may enjoy the ride with papa in the car that the majority holds he, as an applicant for temporary assistance, is entitled to continue to drive, but they will predictably return to a colder house and an emptier table for it is only from relief allowances made for essentials such as fuel, food and shelter that the money to keep the car going can come.

Id. at 234, 222 N.W.2d at 600 (Hansen, J., dissenting).

In 1977 the Wisconsin Supreme Court reaffirmed the rule that it would invalidate any preconditions to relief outside those in the statutory scheme. State *ex rel.* Tiner v. Milwaukee County, 81 Wis. 2d 277, 260 N.W.2d 393 (1977). In *Tiner*, the court considered the interplay between the general relief and the Aid to Families with Dependent Children (AFDC) statutes. Petitioner, representing herself and all other AFDC recipients, challenged Milwaukee County's blanket refusal to grant general relief to any applicant who was receiving AFDC benefits. The class sought mandamus compelling emergency relief payments to pay for heating fuel for their homes. Petitioners also sought "a declaratory judgment that the county's absolute policy of refusing to grant general relief to AFDC recipients for fuel violates the county statutory duty to furnish relief to all eligible dependent persons within the county." *Id.* at 291 n.9, 260 N.W.2d at 394 n.9. The court noted that the AFDC program contains no allowance for emergency fuel relief, and more importantly, that the general relief provisions do not prohibit the granting of general relief to AFDC recipients. *Id.* at 291, 260 N.W.2d at 395. Instead, *Tiner* presented yet another attempt by Milwaukee County welfare officials to impose nonstatutory restrictions on general relief. Again, the Wisconsin Supreme Court invalidated the additional restriction.

Milwaukee County argued that AFDC benefits fit within the language "other means" as found in § 49.01(4) (now § 49.01(2)), and furthermore, that AFDC benefits are sufficient. 81 Wis. 2d at 283-86, 260 N.W.2d at 396-97. The court, however, stated: "the mere labeling of AFDC payments by the county as 'sufficient' does not necessarily make them so. . . ." *Id.* at 289, 260 N.W.2d at 399. In examining the AFDC statutory scheme more closely, the *Tiner* court also noted that the legislature's failure to declare AFDC recipients ineligible for general relief indicates its intention not to limit applicants' access to general relief. *Id.* at 291 n.8, 260 N.W.2d at 399 n.8.

93. *See* Bernstein v. Toia, 43 N.Y.2d 437, 449, 373 N.E.2d 238, 244, 402 N.Y.S.2d 342, 349 (1977) ("We explicitly recognized in *Tucker* that the Legislature is vested with

cases courts may have to decide whether determining the amount or kind of services the government must provide is a justiciable issue. In these cases the challenged governmental action clearly involves the exercise of discretion, and the responsible officials may argue that the separation of powers or political question doctrine bars judicial intervention.[94]

For example, when plaintiffs in Massachusetts and New York sought an increase in welfare benefits, state officials argued that the courts were constitutionally prohibited from reviewing the sufficiency of benefits.[95] Officials in the Massachusetts case based their argument on the state separation of powers doctrine.[96] The court rejected that argument and held that it is the judiciary's function to determine whether the executive branch is violalting the law, even when the conduct in question involves the appropriation of money.[97] In the New York case state officials made a more compelling argument based on a state constitutional provision that explicitly vests in the legislature the power to determine the manner and means of state aid to the poor.[98] A divided court agreed with the officials that determination of the level of welfare benefits is a matter committed exclusively to the legislature.[99] The results in these cases illustrate the limited use of the political question doctrine in cases involving state poor laws. A court may

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discretion to determine the amount of aid; what we there held prohibited was the Legislature's 'simply refusing to aid those whom it has classified as needy.' ").

94. *See supra* notes 37-70 and accompanying text.

95. Massachusetts Coalition for the Homeless v. Dukakis, No. 80109, slip op. at 3 (Mass. Super. Ct. June 26, 1986); RAM v. Blum, 77 A.D.2d 278, 432 N.Y.S.2d 892 (1980).

96. *Massachusetts Coalition for the Homeless*, No. 80109, slip op. at 5-6.

97. *Id.* at 6.

98. *RAM*, 77 A.D.2d at 280, 432 N.Y.S.2d at 893-94. *See supra* text accompanying note 71 for the constitutional provision relied on by defendants.

99. 77 A.D.2d at 278-84, 432 N.Y.S.2d at 893-96. Five judges of the appellate court wrote four separate opinions in *RAM*. Two judges believed the courts are "constitutionally excluded" from intervening in the area of the amount of public assistance. *Id.* at 278-79, 432 N.Y.S.2d at 893 (Ross & Yesawich, JJ.). One concurring judge agreed that the constitution conferred discretion on the legislature without establishing any standard that a court could review, but that judge would not hold that judicial intervention would never be required. *Id.* at 280-81, 432 N.Y.S.2d at 893-94 (Fein J., concurring). The second concurring judge stated that the issue presented was justiciable but that the legislature had not abused its discretion. *Id.* at 282-84, 432 N.Y.S.2d at 895-96 (Sandler, J., concurring). Thus, even when a state constitution expressly vests discretion in the legislature to determine the manner and means of public assistance, the question of whether a court has the power to review that determination is unsettled.

decline to intervene when a state constitution expressly commits a matter to another branch of government. Even with such a constitutional commitment, the justiciability question is not clearly settled.[100]

Courts reviewing the level or nature of governmental welfare benefits will order a modification of benefits only if the government's conduct violates a clear statutory mandate. In the Massachusetts case discussed above the court held that state officials violated a statutory provision requiring that aid furnished under the AFDC program be sufficient to enable parents to raise children properly in their own homes.[101] Although the court acknowledged that it had neither the duty nor the expertise to say what amount would be sufficient, it held as a matter of law that the level set by defendants was inadequate.[102] Courts in other states have invalidated welfare benefit systems when the governing statutes require individual consideration of need[103] or, like the Massachusetts statute, set a substantive sufficiency standard.[104] When statutes neither require individualized determinations nor set minimum substantive standards, however, courts have refused to interfere with challenged assistance programs.[105]

Courts reviewing the level or type of benefits provided under state poor laws apply the same standards that courts generally apply in re-

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100. *See supra* note 99. *See also* Note, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U.L. REV. 272 (1986), arguing that the court was wrong in concluding that the issue was nonjusticiable. *Id.* at 297.

101. Massachusetts Coalition for the Homeless v. Dukakis, No. 80109 (Mass. Super. Ct. June 26, 1986).

102. *Id.*, slip op. at 13.

103. A Nevada court ordered an increase in the amount of aid for blind persons when the statute requires assistance at a level that adequately meets their "actual need." Villa v. Arrizabalaga, 466 P.2d 663 (Nev. 1970). Similarly, a court in New Hampshire held that a flat grant system (an aid program in which benefits are distributed on a uniform basis rather than in individual basis) was inconsistent with a statute that requires the responsible officials to consider the circumstances in each case. Clark v. New Hampshire Dep't of Health & Welfare, 315 A.2d 187 (N.H. 1974).

104. An Ohio statute provides that those in need are entitled to relief "sufficient to maintain health and decency." OHIO REV. CODE ANN. § 5110.03 (Baldwin 1964). The Ohio Supreme Court held that grant levels set by the state government were too low to comply with that requirement. State *ex rel.* Ventrome v. Birkel, 54 Ohio St. 2d 461, 377 N.E.2d 780 (1978).

105. The New York Court of Appeals and the Hawaii Supreme Court upheld flat grant systems when the relevant state statutes did not contain language requiring individualized grants. *See* Bernstein v. Toia, 43 N.Y.2d 437, 373 N.E.2d 238, 402 N.Y.S.2d 342 (1977); Keller v. Thompson, 532 P.2d 664 (Haw. 1975). Additionally, the Hawaii statute states that benefits shall not *exceed* a level necessary to maintain health and decency, but does not require that benefit meet that standard. HAW. REV. STAT. § 346-

viewing other discretionary conduct of government officials.[106] Courts will uphold the official conduct unless they find that it is inconsistent or in conflict with the statute,[107] or that it is unreasonable or arbitrary and capricious.[108] When interpreting state poor laws, however, courts incline toward a liberal construction of the statutes so that remedial statutory purposes may be achieved.[109]

Remedies granted in cases in which courts found the level of benefits to violate state poor law requirements exemplify judicial reluctance to make discretionary decisions that are committed to other government officials.[110] Some courts merely declared that the established levels conflict with the statutory mandate[111] or held that the levels of benefits must meet the statutory standard.[112] Other courts have gone a small step farther and explicitly ordered government officials to set new levels of benefits in accordance with the statutory requirements.[113] In none of the cases, however, has the court issued specific directions to the responsible government officials telling them how to restructure programs or at what level to set future benefits. As in other areas of law, these drastic measures are necessary and appropriate only if the court concludes that defendants would fail to conform to less intrusive remedial orders.

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73 (1968). This statute is different from OHIO REV. CODE ANN. § 5110.03, which requires the distribution of aid necessary to maintain health and decency.

The Wisconsin Supreme Court found that county officials properly exercised their discretion by providing services in kind (food and housing), rather than the cash relief sought by petitioner. State *ex rel.* Nelson v. Rock County, 271 Wis. 312, 73 N.W.2d 564 (1955).

106. *See supra* notes 46-50 and accompanying text.

107. *See, e.g., Clark*, 315 A.2d at 190; *Bernstein*, 43 N.Y.2d at 448, 373 N.E.2d at 245, 420 N.Y.S.2d at 350.

108. *See, e.g., Keller*, 532 P.2d at 671-62; *Arrizabalaga*, 466 P.2d at 665; *Bernstein*, 43 N.Y.2d at 448, 373 N.E.2d at 245, 402 N.Y.S.2d at 350.

109. *See Massachusetts Coalition for the Homeless*, No. 80109, slip op. at 7 (quoting SUTHERLAND & SAND'S STATUTORY CONSTRUCTION § 71.08 (4th ed. 1972)).

110. *See supra* notes 55-70 and *infra* notes 207-10 and accompanying texts for general discussion of remedial choices in lawsuits that challenge the conduct of government officials.

111. *See, e.g., Clark*, 315 A.2d at 190-91.

112. *See, e.g.*, State *ex rel.* Ventrome v. Birkel, 54 Ohio St. 2d 461, 377 N.E.2d 780 (1978).

113. *See, e.g., Massachusetts Coalition for the Homeless*, No. 80109, slip op. at 14-15; *Arrizabalaga*, 466 P.2d at 665-66.

III. STATE COURT RECOGNITION AND ENFORCEMENT OF GOVERNMENTAL DUTIES TO THE HOMELESS

In litigation against government entities and officials to secure shelter and other relief for homeless people, courts generally face three contested issues.[114] Do homeless plaintiffs have a legal right to shelter and other services, and does a government have a corresponding duty to these plaintiffs? Can the court review the conduct of responsible government officials to determine whether they have acted or failed to act in a manner that violates a plaintiff's right? Finally, what remedies can the court impose to provide relief for homeless plaintiffs without improperly intruding into matters committed to the legislative and executive branches of government? Each of these issues will be discussed below.

A. *Finding a Right to Shelter and Other Services in Governmental Duties to the Poor*

Courts have found, in state constitutional and statutory provisions like those described in Part II above, governmental duties to provide shelter and other services for homeless people.[115] In a seminal case involving the rights of the homeless, *Callahan v. Carey*, a New York court in 1979 found "that the Bowery derelicts are entitled to board and lodging," and that state and city officials had a duty to furnish these services.[116] The court found these rights and duties to exist in the general provisions of the state constitution[117] and the state poor

114. Courts dealing with the claims of homeless people have had no difficulty finding that without shelter plaintiffs would suffer irreparable harm. In Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979), the court cited undisputed evidence that homeless men without shelter would freeze to death from exposure and would starve to death without food. The courts also have concluded, with minimal discussion, that irreparable harm to homeless plaintiffs outweighs the hardship to the defendants in providing shelter.

In Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. 1983), the threat of irreparable harm was a statutory and regulatory prerequisite to the provision of adult protective services. The court, however, did not have to deal with the issue of irreparable harm because imminent harm is a qualifying factor for relief under the statute.

115. The Federal Constitution contains no right to shelter or minimally adequate housing. Lindsay v. Normet, 405 U.S. 56, 74 (1972); Williams v. Barry, 490 F. Supp. 941, 944 (D.D.C. 1980), *aff'd in part and vacated in part*, 708 F.2d 789 (D.C. Cir. 1983).

116. N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979).

117. N.Y. CONST. art. XVII, § 1. *See supra* text accompanying note 71 for full text.

laws.[118] The constitutional provision mandates that the state provide "aid, care and support" for the needy.[119] The statutes impose on public welfare districts the responsibility "for the assistance and care" of any person in need,[120] and impose on social services officials the duty "to provide adequately for those unable to maintain themselves," and to "administer such care, treatment and service as may restore such persons to a condition of self support or self care."[121]

A New Jersey court found under that state's poor laws that "homeless and needy persons . . . have a right to safe and suitable emergency shelter and other immediate assistance such as food and clothing."[122] The court in *Maticka v. Atlantic City*[123] relied on a statutory provision requiring that "[i]mmediate public assistance shall be rendered promptly to any needy person by the director of welfare of the munici-

118. N.Y. SOC. SERV. LAW §§ 62(1), 131(1), (3) (McKinney 1983).

119. N.Y. CONST. art. XVII, § 1.

120. N.Y. SOC. SERV. LAW § 62(1) provides in full: "Subject to reimbursement in the cases hereinafter provided for each public welfare district shall be responsible for the assistance and carre of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself."

121. N.Y. SOC. SERV. LAW § 131(1), (3) provide:

> 1. It shall be the duty of social services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves, in accordance with the requirements of this article and other provisions of this chapter. They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges.
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> 3. As far as possible families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life. In providing such services, the public welfare official may utilize appropriate community resources, including nonprofit private agencies. Whenever practicable, assistance and service shall be given a needy person in his own home. The commissioner of public welfare may, however, in his discretion, provide assistance and care in a boarding home, a home of a relative, a public or private home or institution, or in a hospital.

In a more recent case involving homeless families with children, a New York appellate court also found a right to emergency shelter in the state constitutional provision relied on in *Callahan*. *See* McCain v. Koch, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986). *See also* Koster v. Webb, 598 F. Supp. 1134, 1138 (E.D.N.Y. 1983) (denying motion to dismiss complaint alleging unlawful denial of shelter under New York state law).

122. Maticka v. Atlantic City, No. L-8306-84E (N.J. Super. Ct. Jan. 29, 1985).

123. *Id.*

pality. . . ."[124] In addition, the statute requires that the director render such aid and assistance as he deems necessary to prevent suffering from cold, hunger, and lack of shelter.[125]

In a Missouri case that resulted in a consent decree requiring the provision of shelter and other services for homeless people, plaintiffs asserted rights under a state statute that provides: "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."[126]

In addition to statutes creating a general duty to support poor persons, homeless litigation has been brought under statutes that provide for the assistance of more discrete segments of the population, such as "incapacitated adults,"[127] persons released from mental institutions,[128] needy families with children,[129] and persons displaced because of con-

124. General Public Assistance Law, N.J. STAT. ANN. § 44:8-120 (West Supp. 1986).

125. *Id.* § 44:8-122. The full text of this selection is set out in note 84, *supra.*

126. MO. REV. STAT. § 205.580 (1978). Prior to entry of the negotiated consent decree the court denied defendants' motion to dismiss, implicitly recognizing the legitimacy of plaintiffs' cause of action. Graham v. Schoemehl, No. 854-00035 (Mo. Cir. Ct. Oct. 4, 1985).

127. The West Virginia Supreme Court, in Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. 1983), found a right to shelter, food, and medical care for homeless poor persons under a state statute designed to provide protective services to incapacitated adults. The court relied on the Social Services for Adults Act, W. VA. CODE §§ 9-6-1 to 9-6-8 (Supp. 1982), to conclude that the legislature intended the term "incapacitated adult" to include indigent homeless persons who are unable to provide for themselves the basic necessities of life. 303 S.E.2d at 249-50. The act defines "incapacitated adult" as "any person who by reason of physical, mental or other infirmity is unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health." W. VA. CODE § 9-6-1(4) (Supp. 1982). The court interpreted the phrase "or other infirmity" to include poor persons who are unable to care for themselves. 303 S.E.2d at 249-50.

128. In New York a narrower class of homeless persons, those released from mental institutions, asserted their rights to a service plan that would ensure both continued treatment and adequate housing. Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984). The plaintiffs in *Klostermann* relied primarily upon New York's mental health statutes that entitle discharged or released mental patients to a written service plan and a program to insure adequate living facilities and receipt of needed services. N.Y. MENTAL HYG. LAW § 29.15(f)-(h) (McKinney 1978). Though it did not reach the merits of the case, the court held that plaintiffs asserted justiciable claims for declaration and enforcement of their statutory rights. 61 N.Y.2d at 535-37, 463 N.E.2d at 593-94, 475 N.Y.S.2d at 252-53. *See infra* notes 136-41 and accompanying text for discussion of the *Klostermann* case.

129. A New York appellate court found a duty to provide emergency shelter for homeless families with children in the state's election to participate in a program for Emergency Assistance to Needy Families With Children (EAF). McCain v. Koch, 117

demnation of their residences.[130] In some of these cases a critical issue was the determination of the intended statutory beneficiaries. Courts have applied a liberal construction to the statutes, as they have in enforcing state poor laws in other contexts, and have found the statutes to cover broad classes of homeless persons.[131]

None of the courts rendering decisions in homeless cases had diffi-

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A.D.2d 198, 502 N.Y.S.2d 720 (1986). The *McCain* case involved only the granting of a preliminary injunction, so the court's precise holding was that the plaintiffs have a "high probability" of establishing their right to emergency shelter. The EAF program is a part of the federally funded program for Aid to Families with Dependent Children (AFDC). *Id.* at 204, 502 N.Y.S.2d at 723. As part of the EAF plan the state specified its election "to provide the service of 'securing family shelter' when necessary to cope with emergency situations." *Id.* at 212, 502 N.Y.S.2d at 728. *See* Koster v. Webb, 598 F. Supp. 1134, 1136-37 (E.D.N.Y. 1983) (denying motion to dismiss complaint alleging right to emergency shelter under the EAP program). In a recently filed lawsuit, plaintiffs challenged the federal government's failure to monitor states that participate in the EAF program. Plaintiffs sought to require those states to provide emergency shelter. Cohen v. Bowen, No. 86-2448 (D.D.C. Sept. 2, 1986) (Complaint for Declaratory and Injunctive Relief).

130. The Connecticut Supreme Court found that persons rendered homeless by a city's condemnation of their residences as unsafe and unfit for human habitation were entitled to the benefits of a city-provided relocation assistance program. Dukes v. Durante, 192 Conn. 207, 471 A.2d 1368 (1984). The court found that the relocation statute, CONN. GEN. STAT. §§ 8-226 to 8-282 (1983), required the city to provide facilities or services necessary to ensure, prior to displacement, the availability of suitable replacement housing. 192 Conn. at 213-14, 219-20, 224, 471 A.2d at 1372-73, 1376, 1378.

131. In Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. 1983), the government argued that petitioners were not "incapacitated adults" entitled to the benefits of the protective service statute simply because they were homeless poor persons. *Id.* at 248-49. The government relied in part upon department of welfare regulations limiting services to persons suffering from physical or mental infirmities. *Id.* at 249. The court, however, broadly interpreted the statute as remedial legislation. *Id.* at 250. The court concluded that when the legislature included the phrase "other infirmity" in the definition of "incapacitated adult," it intended that the term include poor persons who cannot care for themselves. *Id.* at 249-50.

A similar issue was present in Graham v. Schoemehl, No. 854-00035 (Mo. Cir. Ct. 1985), in which the city of St. Louis argued that the general duty to relieve the poor contained in MO. REV. STAT. § 205.580 (1978) was limited by another provision that provides: "Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons." MO. REV. STAT. § 205.590 (1978). Plaintiffs argued that all homeless poor persons are infirm, relying in part on *Hodge*, and also that § 205.590 is not intended to provide an exclusive definition of "poor persons." Support for plaintiff's interpretation that the provision is not a limitation "but rather is a statement of particular classes, among others, to which the statute shall apply," is found in a Missouri Attorney General opinion. *See* Op. Att'y Gen. 141 (1968). The court in *Graham* did not resolve that dispute, but the consent decree is written broadly to include the homeless plaintiffs "and all other people in the City of St. Louis who are or

culty finding the provision of shelter and other necessities of life among the services included in the government's duty to poor plaintiffs. While a few of the cases involved statutes that specifically require the securing or provision of shelter,[132] other cases dealt with statutes containing only passing reference to shelter[133] or no reference to shelter at all.[134]

B. *Judicial Review of Official Conduct to Determine Whether It Violates Plaintiff's Rights and Fails to Satisfy Defendant's Duties*

When judicial inquiry turns to assessing the action or inaction of government officials to determine whether this conduct violates plaintiffs' rights, one of two standards must be met before a court may consider granting affirmative relief. A court must find either that the government is failing to perform a mandatory duty or that its conduct amounts to an abuse of discretion.[135] When dealing with this issue a court is most likely to face questions concerning the extent of its powers to review the conduct of coordinate branches of government.

In some homeless cases the government's failure to act is clear. In *Callahan v. Carey*, in which the court found that homeless men have a right to shelter and that the defendant officials had a duty to provide it, the evidence clearly indicated that the officials were not providing enough shelter to accommodate all of the homeless men who needed it. Similarly, in *Dukes v. Durante* the officials simply were not doing anything to meet their obligation to assure the availability of suitable re-

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will become homeless." Graham v. Schoemehl, No. 854-00035 (Mo. Cir. Ct. Nov. 15, 1985) (consent decree).

Similarly, defendants in Dukes v. Durante, 192 Conn. 207, 471 A.2d 1368 (1984), contended that the state Relocation Assistance Act does not cover persons displaced by housing code enforcement but only persons required to move because of building code enforcement or other city activity. *Id.* at 212, 471 A.2d at 1372. The court relied on a reading of the statute as a whole and construed the Act broadly to include all persons displaced by any kind of code enforcement activity. *Id.* at 214-21, 471 A.2d at 1373-76.

132. *See, e.g.*, Dukes v. Durante, 192 Conn. 207, 471 A.2d 1368 (1984); Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984); McCain v. Koch, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986). *See supra* notes 128-30 for a discussion of these cases.

133. Maticka v. Atlantic City, No. L-8306-84E (N.J. Super. Ct. Jan. 29, 1985); Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. 1983). *See supra* notes 122-25, 127 and accompanying texts.

134. Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979); McCain v. Koch, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986).

135. *See supra* notes 26-27, 46-50 and accompanying texts.

placement housing before displacing tenants by condemnation. After the courts in these cases found a mandatory duty that was intended to benefit plaintiffs, they had no difficulty determining that defendants were not complying with the statute. In other cases, however, courts must carefully analyze the statutory scheme to determine whether mandatory duties exist and if so, whether defendants are engaging in conduct that satisfies these duties.

In *Klostermann v. Cuomo*[136] the statute at issue required that municipalities create and implement, for each deinstitutionalized mental patient, a plan covering both treatment and an appropriate residence.[137] Plaintiffs alleged that the responsible officials failed to create and implement these plans.[138] Defendants argued, and the lower courts held, that the controversy was nonjusticiable because the statutory duties involve the exercise of discretion, and in particular, questions of resource allocation.[139] The New York Court of Appeals reversed, articulating a basis distinction that defendants and the lower courts failed to make "between a court's imposition of its own policy determination upon its governmental partners and its mere declaration and enforcement of the individual's rights that have already been conferred by the other branches of government."[140] The court held that plaintiffs' claims presented the latter situation, and that they were, therefore, justiciable.[141]

A mix of discretionary and nondiscretionary activity also existed in *Hodge v. Ginsberg*[142] and *Maticka v. Atlantic City*.[143] The courts in both of those cases concluded that the responsible officials were failing to perform mandatory duties to provide emergency shelter and other services to homeless plaintiffs.[144]

The statute in *Hodge* provided that the Department of Welfare "*may* develop a plan for a comprehensive system of adult protective serv-

136. 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984).

137. *Id.* at 532 n.1, 463 N.E.2d at 591 n.1, 475 N.Y.S.2d at 250 n.1.

138. *Id.* at 531-32, 463 N.E.2d at 591-92, 475 N.Y.S.2d at 250-51.

139. *Id.* at 533, 463 N.E.2d at 592, 475 N.Y.S.2d at 251.

140. *Id.* at 535, 463 N.E.2d at 593, 475 N.Y.S.2d at 252. The court also rejected defendants' resource allocation argument. *Id.* at 536-37, 463 N.E.2d at 594, 475 N.Y.S.2d at 253.

141. *Id.* at 537, 463 N.E.2d at 594, 475 N.Y.S.2d at 253.

142. 303 S.E.2d 245 (W. Va. 1983).

143. No. L-8306-84E (N.J. Super. Ct. Jan. 29, 1985).

144. *Hodge*, 303 S.E.2d at 251, *Maticka*, No. L-8306-84E, slip op. at 5-6.

ices," and that any such plan "*shall* offer such services as are available and appropriate."[145] Because the department exercised its discretion and developed a plan under the statute, the court concluded that the duty to offer available and appropriate services was mandatory and nondiscretionary.[146] The statute also gave the official discretion to promulgate implementing regulations to the extent that he "believes *feasible . . . within the state appropriations and other funds available.*"[147] The court found that the official had exercised his discretion by promulgating regulations that established a mandatory duty to provide assistance that "will meet the individual's needs."[148] The court issued a writ of mandamus based on its conclusion that the official had a mandatory and enforceable duty "to provide such services as are 'appropriate in the circumstances' . . . and which 'meet the individual's needs.' "[149]

The statute in *Maticka* required the director of welfare to provide such assistance "as he may in his discretion . . . deem necessary" to prevent unnecessary suffering or deprivation of shelter.[150] The court found that the city failed to provide shelter and other immediate assistance to some of the homeless plaintiffs, and that substantial numbers of homeless persons and inadequate shelter facilities existed in Atlantic City. Based on those findings the court concluded that city officials were failing to satisfy their statutory duties, and issued a permanent injunction.[151]

The only homeless case in which a court refused to interfere with the conduct of another branch of government involved New York's explicit constitutional commitment of discretion to the state legislature. In *McCain v. Koch*[152] the court measured the conduct of New York City and State officials against the state constitutional requirement to relieve the poor "in such manner and by such means, as the legislature

145. *Hodge*, 303 S.E.2d at 250 (emphasis added by the court).

146. *Id.*

147. *Id.* (emphasis added by the court).

148. *Id.* at 251.

149. *Id.*

150. The court relied on N.J. STAT. ANN. § 44:9-122 (West Supp. 1986), the text of which is set out in note 84, *supra*. *Maticka*, No. L-8306-84E, slip op. at 5.

151. *See generally Maticka*, No. L-8306-84E (N.J. Super. Ct. Jan. 29, 1985).

152. 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986).

may from time to time determine."[153] The court found that the city's policy of providing cash allowances and housing information to homeless families amounted to a denial of aid and violated the constitutional duty.[154] When it dealt with the issue of the adequacy of shelter provided by the city, however, the court held that it was unable to interfere with the city's discretionary conduct as long as its efforts were more than token.[155]

C. *Remedies in Homeless Cases*

A variety of remedies have been imposed in litigation seeking shelter and other services for the homeless. Courts that have provided relief in homeless cases generally have attempted to minimize intrusion into governmental affairs.

1. Minimally Intrusive Remedies

Most of the remedial orders entered in homeless rights cases to date did not intrude deeply into matters committed to the discretion of legislative or executive bodies. *Klostermann v. Cuomo*[156] exemplifies this approach. Plaintiffs in *Klostermann* sought an order requiring the state to develop and implement individual plans for the housing and treatment of discharged mental patients.[157] Reversing the lower courts' dismissal of plaintiffs' claims as nonjusticiable, the New York Court of Appeals held that a judgment in plaintiffs' favor need not involve the courts in executive and legislative decisionmaking, but may simply be a declaration and enforcement of rights already conferred by the other branches.[158] The court explained that if government officials fail to perform mandatory, nondiscretionary duties, a court may order them to fulfill their obligations.[159] The court was careful, however, to impose a limit on interference with the discretionary choices that the leg-

153. N.Y. CONST. art. XVII, § 1. See *supra* text accompanying note 71 for the full text of this provision.

154. 117 A.D.2d at 216, 502 N.Y.S.2d at 730.

155. *Id.* at 218-19, 502 N.Y.S.2d at 732-33. See *infra* notes 178-80 and accompanying text for discussion of this issue in the context of the court's remedial power. See also Note, *supra* note 100, arguing that the discretion granted to the legislature is subject to review by the courts. *Id.* at 297.

156. 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984).

157. *Id.* at 533, 463 N.E.2d at 592, 475 N.Y.S.2d at 251.

158. *Id.* at 536, 463 N.E.2d at 593-94, 475 N.Y.S.2d at 252-53.

159. *Id.* at 540, 463 N.E.2d at 596, 475 N.Y.S.2d at 255.

islature reserved to defendants.[160] Thus, on remand, the lower court in *Klostermann* could order the state to develop and implement individual housing and treatment plans but may be unable to not dictate the content of those plans.[161]

In cases involving a claimed right to shelter and other necessities of life under a general statute or constitutional provision requiring aid or support for the poor, several courts have avoided intrusive remedies by ordering the responsible public officials merely to provide shelter and other specified services. In *Callahan v. Carey*[162] the court issued a temporary injunction requiring New York City to find lodgings and provide food for its homeless men.[163] In *McCain v. Koch*[164] the court granted "a preliminary injunction barring the denial of emergency shelter to homeless families."[165]

Some courts have added to these directives a provision that the government accord relief in the manner required by statutes and regulations. The court in *Hodge v. Ginsberg*,[166] for example, directed the state "to provide emergency shelter, food and medical care to the petitioners and other similarly situated persons as required by" West Virginia statute and regulations.[167] A dissenting justice in *Hodge* asserted that the court's order was deficient because it failed to clearly specify what emergency services the state must provide, who is to receive the benefits, and how the state is to obtain the resources to implement the

160. *Id.* at 541, 463 N.E.2d at 596, 475 N.Y.S.2d at 255. The court stated: "The activity that the courts must be careful to avoid is the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative branches." *Id.*

161. The trial court in *Klostermann* has issued one order on remand, 126 Misc. 2d 247, 481 N.Y.S.2d 580 (N.Y. Sup. Ct. 1984), but has not yet reached the merits of this issue.

162. N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979).

163. The court also directed defendants to submit a plan for lodging and feeding 750 men. *Id.* A later *Callahan* order entered a consent decree dealing with space and facilities requirements at public shelters. *See* Eldredge v. Koch, 98 A.D.2d 675, 469 N.Y.S.2d 744 (1983) (describing the *Callahan* consent decree).

164. 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986).

165. *Id.* at 211, 502 N.Y.S.2d at 727-28.

166. 303 S.E.2d 245 (W. Va. 1983).

167. *Id.* at 251. *See also* Maticka v. Atlantic City, No. L-8306-84E (N.J. Super. Ct. Feb. 16, 1984), ordering "that defendants immediately take such steps as are necessary to provide plaintiffs and other homeless men and women with safe and suitable emergency shelter and immediate assistance pursuant to the requirements of the General Public Assistance Law . . . and the General Assistance Manual. . . ."

order.[168] What the dissent overlooks and the majority does not articulate is that these are matters that the legislature originally entrusted to the discretion of responsible public officials. If the court provided the directions found lacking by the dissent, it would be intruding deeply into discretionary areas.

The court took a more intrusive remedial step in *Callahan* by ordering the city both to provide shelter and food and to submit a plan for the provision of these services to 750 men.[169] This type of order allows officials an opportunity to exercise their discretion in determining, with court supervision and guidance, how to comply with their constitutional and statutory duties to the poor.

2. Detailed Remedial Orders

Courts have imposed detailed injunctive relief in some homeless cases, covering matters that ordinarily would be left to the discretion of executive and legislative bodies. In some cases courts have imposed this relief as the result of negotiations between homeless persons and governments.

Nearly two years after the New York Supreme Court granted a preliminary injunction in *Callahan v. Carey*,[170] it endorsed a consent decree ordering the city to provide food and shelter to every needy homeless man and to set minimum shelter standards in terms of physical space and bathroom facilities.[171]

A lawsuit on behalf of the homeless poor in St. Louis was resolved with the entry of a consent decree committing the city to meet both the short- and some of the long-term needs of the homeless.[172] The decree in *Graham v. Schoemehl*[173] broadly defines the term "homeless" to include persons without shelter, persons temporarily staying in private

168. *Hodge*, 303 S.E.2d at 251-52 (Neely, J., dissenting). The dissent paraphrased the order as follows: "*We* are against homelessness and we want *you*, without funds (since we haven't any spending authority) and without guidance (since we don't want to take the trouble to think the problem through), to do something (but we won't tell you what) about it." *Id.* at 252 (emphasis and quotations marks in original).

169. Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979).

170. *Id.*

171. *See supra* note 163.

172. Graham v. Schoemehl, No. 854-00035 (Mo. Cir. Ct. Nov. 15, 1985). *See supra* note 126 and accompanying text for a description of the basis for plaintiffs' claims.

173. *Id.*

emergency shelters, and persons living in unsafe housing.[174] The decree requires the city to operate a centralized reception center and a day center for homeless women, children, and families; to provide transportation; and to make available transitional services such as job counseling, life skills classes, and housing assistance.[175] The decree further mandates a minimum amount of money that the city must spend during fiscal year 1985-86 to provide these services, and requires the city to create in 1986 new emergency shelter space for at least 200 people and to provide at least 100 additional permanent housing units for the homeless.[176]

In two homeless shelter cases with detailed court-imposed injunctive orders, the appellate courts found the relief overly intrusive and consequently required modification.[177] The trial court in *McCain v. Koch*[178] imposed minimum standards of decency, health, and safety for family shelter facilities.[179] The appellate court reluctantly struck down those standards on the ground that the adequacy of aid to the poor is a matter committed by the state constitution to the legislature's discretion.[180]

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174. *Id.*

175. *Id.*

176. *Id.*

177. Dukes v. Durante, 192 Conn. 207, 471 A.2d 1368 (1984); McCain v. Koch, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986).

178. 127 Misc. 2d 23, 484 N.Y.S.2d 985 (N.Y. Sup. Ct. 2984), *aff'd in part, rev'd in part, and modified in part*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986).

179. *Id.* at 24-25, 484 N.Y.S.2d at 987.

180. 117 A.D.2d at 216, 502 N.Y.S.2d at 731. The court interpreted earlier cases to preclude judicial intrusion into the issue of adequacy of services provided to the poor. The court held that as long as the city's efforts are more than token, its conduct is unreviewable:

> [W]e are unable to afford the plaintiffs complete and meaningful relief. The inability of courts to set even minimum standards for meeting "the legitimate needs of each recipient" . . . upon the failure of the Legislature to do so is discouraging, saddening, and disheartening. When thousands of children are put at risk in their physical and mental health, and subject to inevitable emotional scarring, because of the failure of the City and State officials to provide emergency shelter for them which meets minimum standards of decency and habitability, it is time for the Court of Appeals to reexamine and, hopefully, change its prior holdings in this area. The lives and characters of the young are too precious to be dealt with in a way justified, as argued, on the ground that the government's efforts are more than token. They may be more than token, but they are inadequate. . . .
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> . . . . In light of the broad discretion vested in the Legislature, we cannot conclude that plaintiffs are likely to prove that Article 17 substantively guarantees

The Connecticut Supreme Court modified a detailed injunction in *Dukes v. Durante*[181] on the grounds that the relief imposed by the trial court was too drastic and inflexible.[182] Prior to the issuance of the injunction the city petitioned the trial court for a hearing in which it could have input into the scope of relief to be granted.[183] Without ruling on that request the trial court issued an injunction requiring the city to provide the following for each person displaced due to condemnation: emergency shelter for two weeks, temporary housing with a kitchen and adequate space for up to four months, relocation benefits, school transportation for children, and permanent housing within four months after displacement.[184] The court was sympathetic to the city's argument that only a program of newly constructed housing would enable it to satisfy the trial court's order, and thus ordered the lower court to modify its order to allow the city to comply by continuing with its plan to rehabilitate existing housing.[185]

IV. Suggested Analysis of Justiciability and Remedial Issues in Homeless Cases

A pattern of issues is forming in the increasingly frequent lawsuits brought by the homeless under state laws creating general governmental duties to the poor. The most difficult issues tend to revolve around justiciability and remedies. A comprehensive approach that would organize these problems and suggest ways of resolving them is needed. This section represents one attempt to provide such a general framework.

A. *Determination of Which Issues are Justiciable in Homeless Cases*

When homeless poor people sue government entities and officials to enforce state poor law provisions, courts must determine whether the issues raised by plaintiffs are justiciable. Governments argue that what they do to aid the poor and how they do it are nonjusticiable political

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minimal physical standards of cleanliness, warmth, space, and rudimentary convenience in emergency shelter.

Id. at 216-17, 502 N.Y.S.2d at 731. See Note, *supra* note 100, arguing that the legislative discretion is reviewable. *Id.* at 297.

181. 192 Conn. 207, 471 A.2d 1368 (1984).

182. *Id.* at 225, 471 A.2d at 1378.

183. *Id.* at 211-12, 471 A.2d at 1372.

184. *Id.* at 210-11, 471 A.2d at 1371-72.

185. *Id.* at 225-26, 471 A.2d at 1378.

questions. This argument is based on the ground that these matters are exlcusively committed to their discretion or that the issues involve broad questions of public policy and resource allocation.[186]

Among the threshold questions in homeless suits are issues of statutory construction—who are the intended beneficiaries of the law in question, and what rights do they have. Homeless plaintiffs may seek only a declaratory judgment, or the determination of their rights may serve as the predicate for a mandatory injunction or writ of mandamus.[187] In either case, when a controversy exists regarding the existence, definition, or extent of rights and duties under a constitutional or statutory provision, the proper interpretation of that provision is an appropriate question for judicial resolution.[188]

Before a court can issue an injunction or writ of mandamus it must determine whether the rights and duties created by the state poor law are judicially enforceable. If the court finds that the law gives each homeless person an enforceable individual right to shelter, and if the government is failing to provide enough shelter for all who need it, the government is violating its legal duty and the court can order compliance. Governments may argue, however, that the law creates only a duty to the general public, that the duty is to do what is reasonably necessary to relieve the poor, and that how to perform the duty and what resources to allocate to the problem of poverty are nonjusticiable political questions. To determine whether the rights asserted in homeless cases are judicially enforceable, courts should look to the language of the statutory provision and the nature of the activity to be performed.

1. Language of the Provision

There are several respects in which the language of a statutory provision may help determine whether it creates judicially enforceable individual rights.

a. Whether the Conduct is Discretionary or Mandatory

A court should first distinguish between mandatory and discretion-

186. *See supra* notes 37-54 and accompanying text.

187. The existence of a legal right is a necessary element for both an injunction and a writ of mandamus. *See supra* notes 20, 30 and accompanying texts.

188. Courts must construe the provision in question before determining whether rights are judicially enforceable. L. TRIBE, *supra* note 37, § 3-17. *See supra* notes 51-52 and accompanying text.

ary activities. Even if the conduct in question involves the exercise of discretion, the court must recognize that some conduct is mandatory though its means of execution are discretionary.[189] For example, a statute might state that the government may provide shelter. Another statute might provide that the government shall provide shelter, without prescribing the manner in which that duty is to be performed. Under the first statute, the duty is certainly discretionary. Under the latter statute, however, the duty to provide shelter is mandatory; only the manner of execution is discretionary. Under that statute, a court that considers whether the government is satisfying its duty to provide shelter, and not how the shelter is provided, may determine only whether defendant performed the mandatory duty. A common example of this distinction arises when a court, in determining whether a government official has made a decision on a license application, will not intrude into the discretionary matter of whether the application should have been granted or denied.[190] Thus, when the issue is whether or not a government official has performed a mandatory duty, even though the manner in which the official ultimately performs the duty is left to his or her discretion, courts should not be reluctant to review the official conduct.

b. Description of the Class of Beneficiaries

A duty to provide shelter and other services for the homeless is often found in a statute or constitutional provision that creates an affirmative duty to the poor.[191] Whether affirmative governmental duties fit

189. *See* Klostermann v. Cuomo, 61 N.Y.2d 525, 539, 463 N.E.2d 588, 595, 475 N.Y.S.2d 247, 254 (1984).

190. *See* Stuart & Stuart, Inc. v. State Liquor Auth., 29 A.D.2d 176, 286 N.Y.S.2d 861 (1968). Similarly, though setting pay rates for police officers or selecting a particular route for a highway may be unreviewable discretionary acts, a court may determine whether government officials followed specific nondiscretionary procedural requirements before making their discretionary decisions. Denver Police Protective Ass'n v. City of Denver, 665 P.2d 150 (Colo. Ct. App. 1983); Orange County v. North Carolina Dep't of Transp., 265 S.E.2d 890 (N.C. Ct. App. 1980).

191. Rights and duties may be expressed either as prohibitions or as affirmative duties. Individual rights that are expressed as prohibitions generally involve limitations on governmental powers and create rights to be free from government interference. The Bill of Rights and the Civil War Amendments to the United States Constitution are examples of rights created by absolute prohibitions on government activities. By their prohibitory language those provisions create enforceable rights in every individual within their coverage. It is difficult to imagine, however, a law expressed in prohibitory terms that would create a right to shelter for the homeless.

within the political question doctrine depends on how the state defines the class of intended beneficiaries. When affirmative duties are expressed in mandatory terms, a government argument that the provision creates only general duties to the public still may have facial validity because governmental duties to the poor usually leave the manner in which that duty is carried out to the discretion of the responsible public officials.[192]

The state may describe a class of beneficiaries in specific terms, such as "each," "any," or "every" poor person, or "all" poor persons. For example, a New Jersey statute requires that "public assistance shall be rendered promptly to any needy person."[193] The duty is to serve every poor person covered by the statute, not just to address the problem of poverty in general. The language compels the conclusion that the failure to provide shelter to "any needy person" is a violation of the statute.

In contrast, an affirmative requirement to assist the poor may also describe its intended beneficiaries in general terms. The New York Constitution, for example, mandates governmental support for "the needy."[194] A Missouri statute requires relief for "poor persons."[195] Only when dealing with this kind of general language can it plausibly be argued that responsible officials may satisfy their duties by providing limited services, disregarding some of the law's intended beneficiaries. A government could argue that the duty to provide relief under those provisions is analogous to a duty to conserve the peace, and that no enforceable individual rights are created by such general duties.[196] Unlike a duty made applicable to every member of a class, the language of a provision that describes its beneficiaries in general terms may not be determinative of the question whether it creates judicially enforceable rights.

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192. *See supra* notes 71-84 and accompanying text.

193. General Public Assistance Law, N.J. STAT. ANN. 44:8-120 (West Supp. 1986).

194. N.Y. CONST. art. XVII, § 1. See *supra* text accompanying note 71 for the full text of this section.

195. MO. REV. STAT. § 205.580 (1978). See *supra* text accompanying note 126 for the full text of this provision.

196. *See* Weber v. City of Sachse, 591 S.W.2d 563 (Tex. Civ. App. 1979) (reversing injunction requiring increase in level of police protection).

2. Nature of the Activity to Be Performed and the Impact on Individual Beneficiaries

When statutory language is inconclusive, the court should look to the nature of the governmental activity to determine whether general public policy or individual rights should be enforced. Courts should consider whether government action or inaction affects the individual beneficiaries of the law. When a plaintiff asserts a claim against a government, alleging denial of an individual right, he or she should show the impact of the denial on the individual beneficiaries. Otherwise, the complaint may implicate only the performance of a duty owed to the public in general.[197]

This public policy/individual rights factor is related to, but different from the question of standing. Though both issues require consideration of the relationship between the interest of the plaintiff and the claim being asserted, standing focuses more on the party seeking relief than the claim asserted.[198] The question of individual impact focuses on these claims, and assumes that the suit has been brought by the proper parties, that is, the intended beneficiaries of the law who are affected by the alleged action or inaction.

It is helpful to distinguish claims alleging a complete denial of service from claims alleging an insufficiency of service. Making that distinction, however, is not as easy as it might seem. For example, plaintiffs could claim that a government is not providing enough shel-

197. One can compare the duty to assist the poor with other affirmative duties, such as the duty to provide police protection and the duty to provide an education, commonly imposed on states or their subdivisions. An individual might assert a right to safety and security and argue that the government should be required to provide more police protection. If a person complains that the police consistently fail to respond to calls at a particular home or neighborhood, a court may be able to measure the impact on the affected individual(s) and determine that a right is being violated. If, however, an individual claims that the police department is not providing safety and security because there are not enough officers or insufficient street patrols, the plaintiff may not be able to demonstrate personal impact. In this context, a court may determine that the issue implicates only general public policy and not enforceable individual rights.

Parents might claim that their child is being deprived of an education and that the government must provide more schooling. It is easy to determine whether a child is being excluded from school, and such exclusion may be considered the denial of an individual right. If parents complain that their child is not getting an adequate education, the impact is not as clear. Unlike the claim of insufficient police protection, measures exist to test the benefits of a particular educational program. Educational inadequacies may amount to an effective denial of service and, consequently, the denial of an individual right.

198. L. TRIBE, *supra* note 37, § 3-17.

ter space. This claim could be viewed in a variety of ways. The government could characterize a court's treatment of the claim as an improper intrusion into the determination of how much money to allocate for relief of the homeless. The court, however, need not decide the monetary issue to determine whether adequate space exists. A complaint of inadequate space could be based on the fact that some homeless people have been turned away from shelters. That is a denial-of-service issue. The same complaint, however, could mean that even though every homeless person is sheltered, the shelters are too small and overcrowded. This is a sufficiency-of-service issue.

a. Denial-of-Service Claims

If a homeless person or class alleges a denial of the basic necessities of life such as shelter, food, security, and health care in violation of a governmental duty to assist or relieve the poor, the individual impact from the denial of service is obvious and potentially great. Thus, when plaintiffs allege that a government has failed to provide some homeless people with shelter and other basic necessities, and the court determines that a state poor law mandates those services, the court should conclude with relative ease that the compliance issues are justiciable. Plaintiffs are not merely attempting to litigate questions of public policy; they are claiming that the government is violating legal rights.

b. Sufficiency-of-Service Claims

Most poor laws leave the type or level of services that the government is to provide to the discretion of public officials. When plaintiffs complain about the sufficiency of services a government can assert the political question doctrine. In this instance, the government will argue that a court may not review discretionary choices either because the decisions are explicitly committed to the legislative or executive branches of government, or because they involve the application of standards or the determination of broad policy issues that the judiciary is not equipped to handle.[199]

If a court concludes that those issues are nonjusticiable, however, even token performances would be unreviewable. It may be a legislative function to decide how much aid should be allocated to the poor, but if that decision cannot be reviewed by the judiciary, the duty could

199. *See supra* notes 37-54 and accompanying text.

be nullified by wholly inadequate performance.[200] If a court finds that the homeless poor are entitled to shelter or other services, then it should view the issues that impact on the individuals as an attempt to enforce individual rights.

Level-of-benefits claims under state poor laws clearly involve discretionary choices. If the claim involves governmental conduct that has a direct impact on plaintiffs, more is at stake than general questions of public policy and resource allocation. Moreover, the courts are capable of interpreting the law and determining whether a government has abused its discretion. Therefore, unless the state constitution clearly and exclusively commits the issues to another branch of government, such claims are justiciable.

The courts' first task in dealing with sufficiency claims is to determine the standard imposed by the statutory or constitutional provision. Courts can decide the meaning of the terms "aid," "assist," "maintain," "relieve," and "support." At a minimum, those words mean that the government is responsible to provide or make available services that are necessary for survival. A court also could conclude that the legislature intended a slightly higher standard, such as services that are minimally necessary to allow a decent human existence. Going even further, a court could determine that lawmakers intended that the duty encompass not only short-term help, but assistance to allow the homeless to better themselves and escape the cycle of homelessness. This assistance includes services like life skills education, job training, and assistance in finding employment or permanent housing.[201]

In addition to the language of the statutory or constitutional provision, a court may find guidance as to the intended service standard in the legislative history or, perhaps with the aid of an expert witness, the general historical context in which the legislature enacted the poor law. If historical evidence is available, the court could consider what the

200. Even in New York, where the constitution expressly allows the legislature to determine the manner and means of poor relief, a court found that minimal performance may amount to an effective denial of service and a violation of the constitutional provision. McCain v. Koch, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986). *See also* Note, *supra* note 100, arguing for a more expansive scope of judicial review of legislative discretion. *Id.* at 297.

201. One might argue that the wide range of choices available to courts in interpreting such broad statutory language makes this question nonjusticiable. Courts in other areas, however, have resolved such seemingly open-ended questions of legislative intent. In the area of special education, for example, courts have interpreted the meaning of the term "appropriate education." Board of Educ. v. Rowley, 458 U.S. 176, 187-204 (1982).

needs of the poor were at that time and how much relief the lawmakers intended to provide.[202]

After a court decides what the duty means, it is capable of determining whether a government has abused its discretion.[203] If the standard is low—only those services necessary for human survival—a court can determine compliance by common sense or, if the factual issues are seriously disputed, with the help of expert testimony regarding the services necessary to meet that standard. No expert is necessary if the evidence shows that homeless people are being excluded from shelters or that no food or medical care is available. A court might require expert testimony if the issues are less startling, involving matters such as safety, sanitation, alleged crowding in shelters, or the nutritional value of food.

Whatever the standard, from bare survival to long-term assistance, pure policy and resource allocation questions may be left to the discretion of officials charged with the duty to the poor. The line between justiciable and nonjusticiable compliance questions should be drawn between issues that have direct impact on whether beneficiaries of the law are receiving services necessary to meet the standard, and issues that do not have such impact. The line should not be drawn to remove all quantitative and qualitative decisions from judicial consideration, because the number and size of shelters, the safety and security in shelters, and the amount and nature of food or health care are all issues that affect the well-being of the law's beneficiaries. Pure policy and resource allocation questions that relate solely to how the government provides the services, rather than the amount or nature of the services provided, are nonjusticiable. These nonjusticiable issues might include how much money to spend to help the homeless, whether the government should provide services directly instead of contracting with private agencies, and whether to provide in kind services or establish a cash or voucher system. If the government is fulfilling its obligation to provide or make available the services required under the law, a court should not be concerned with the resolution of those questions. In general, the court must determine whether it is being asked to resolve broad policy questions or whether plaintiffs are seeking enforcement of

202. See Note, *supra* note 100, for an historical review concerning the context of the adoption of New York's constitutional provision mandating aid for the poor. *Id.* at 285-96.

203. *See supra* notes 46-50 and accompanying text.

particular rights bestowed on them by the legislature.[204]

B. *Fashioning Appropriate Remedies in Homeless Cases*

After a court has found a legal right to shelter or other services for the homeless, and a violation of that right, it must consider the nature and extent of the remedy. In a homeless case in which a government violates its duty to provide the services or level of services required by law, the only adequate remedies are injunction and mandamus.[205] Only these remedies are adequate because the government may be immune from a damage remedy, and if not, a damage award would not force it to change its practices in the future.

1. The Competing Interests of the Parties and the Court

Plaintiffs' goals for a complete and detailed remedial order will often be at odds with the desires of governments and the inclinations of courts. Homeless plaintiffs may want the court to provide detailed directions covering administration matters to a government. These matters might include the total number of shelter beds, the maximum number of beds per shelter, the amount of space per shelter bed, the availability of toileting and hygienic facilities, the separation for security reasons of different groups of homeless people into different shelters, the provision of shelter and child care during the day, and a wide variety of other important issues. Government defendants, on the other hand, are likely to prefer freedom from court interference. Even though courts have broad discretion to remedy violations of law, they are often reluctant to issue detailed injunctive relief. State courts with relatively little institutional litigation experience may be particularly reluctant to impose broad and detailed remedies that intrude into the affairs of the executive and legislative branches of government.[206]

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204. *See* Klostermann v. Cuomo, 61 N.Y.2d 525, 536-37, 463 N.E.2d 588, 593-94, 475 N.Y.S.2d 247, 252-53 (1984). The West Virginia Supreme Court stated in Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. 1983): "Inherent in the republican form of government established by our State Constitution is a concept of due process that ensures that the people receive the benefit of legislative enactments." *Id.* at 247.

205. *See supra* note 18 and accompanying text.

206. For example, in Graham v. Schoemehl, No. 854-00035 (Mo. Cir. Ct. Oct. 4, 1985), when the court overruled the defendants' motion to dismiss for lack of jurisdiction, it expressly reserved the question whether it had jurisdiction to issue injunctive relief against the government defendants.

2. Determination of Appropriate Remedies

Three basic principles should guide the courts in the determination of appropriate remedies. First, courts have broad remedial powers to provide relief from violations of law committed by the other branches of government. The use of this power, however, must be tempered by consideration of two additional principles. The nature and scope of the remedy should be no more extensive than the nature and scope of the right violated. In addition, to respect the separation of powers doctrine, the remedy should intrude no more than necessary into the affairs of the coordinate branches of government.

To limit the remedy to the violation and to minimize intrusion, a court should avoid interference with discretionary matters. For example, when a government official fails to perform a mandatory duty or a nondiscretionary component of a discretionary duty, the court can order compliance without directing the method and manner of performance.[207] If the court finds that a government is failing to provide shelter or another service it is legally obligated to provide, the court can simply order the government to provide the service. This type of order leaves the decisions of how to provide the service and how much money to spend to the government. Similarly, if the violation involves a two-dimensional issue such as the eligibility for services of a particular group of people, the court can order the government to reverse its position and make the members of the group eligible. The mere finding of a failure to perform a legal duty or an abuse of discretion should not be enough to require a detailed remedy.

When government conduct involves the exercise of discretion, there are several remedial options that courts should consider before imposing a detailed and intrusive remedy.[208] In its decision, a court can describe how the government is failing to comply with its statutory duty and simply order compliance, in the hope that the government will correct the problem itself.[209] Going a small step further, a court can give the government an opportunity to develop its own solution and time to bring itself into compliance.[210] Courts can also allow or compel

207. *See supra* notes 55, 110-13, 156-59 and accompanying texts.

208. *See* Coffin, *supra* note 57, at 984, 994, 995-96; Eisenberg & Yeazell, *supra* note 57, at 493-94; Special Project, *supra* note 58, at 796-813.

209. *See* Coffin, *supra* note 57, at 984, 994; Special Project, *supra* note 58, at 797-800.

210. *See* Coffin, *supra* note 57, at 984, 994; Eisenberg & Yeazell, *supra* note 57, at 493; Special Project, *supra* note 58, at 802-95.

negotiations between the parties for the formulation of remedial scheme.[211]

3. Detailed and Intrusive Remedies

When evidence of a government's past performance shows that a detailed remedial order is necessary to compel compliance, or when a government has been given an opportunity to comply but continues failing to perform, a court must impose its own solution. The court, however, should consider that a detailed court-imposed remedy is less likely to achieve satisfactory performance than a remedy selected by the government itself or negotiated between the parties.[212] When the government is involved in determining the appropriate remedy, it is more likely to be committed to making the remedy work and less likely to appeal.

Evidence at trial may show that past governmental performance necessitates a detailed and intrusive remedy in order to achieve compliance. In some cases the government may fail to perform its duty to aid the homeless because it does not understand the nature of the duty or it does not perceive the need for governmental intervention. If the court sees no evidence to suggest future noncompliance, it should give the government an opportunity to perform its duty under a general remedial order. In other cases, however, government defendants may recognize their duty to provide shelter and other necessary services to the homeless, but decide to ignore that duty because they want to spend their money on other, nonobligatory services. In these circumstances a court might conclude that only a detailed and intrusive remedy would be effective.

Detailed remedial orders are also necessary when less intrusive remedies have failed to achieve compliance. A court may initially order a government to provide shelter or other specified services to the homeless. If that order fails to achieve satisfactory compliance, the court should consider more detailed and intrusive remedies such as those discussed above.

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211. *See* Eisenberg & Yeazell, *supra* note 57, at 493; Special Project, *supra* note 58, at 809-12.

212. *Compare* Graham v. Schoemehl, No. 854-00035 (Mo. Cir. Ct. Nov. 15, 1985), in which the parties negotiated a detailed consent decree, *with* McCain v. Koch, 127 Misc. 2d 23, 484 N.Y.S.2d 985 (N.Y. Sup. Ct. 1984), *aff'd in part, rev'd in part, and modified in part*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986), and Dukes v. Durante, 192 Conn. 207, 471 A.2d 1368 (1984), two cases in which the appellate courts overturned detailed court-imposed remedies. *See supra* notes 172-85 and accompanying text.

4. Judicial Competency to Determine Appropriate Detailed Remedies

With one major limitation, courts can decide how to help the homeless in the same manner as a legislative or executive body. A legislature or executive agency may have the power to do more than the law requires, but courts must limit their remedial strategies to the rights and duties that the government violated. Courts must first refer to the analysis they undertook at the liability stage, examine the rights and duties created by the relevant statute or constitutional provision, and determine the proper substantive standard.[213] This analysis will establish the limits of the court's remedial power. The scope of the remedy depends on whether the government's duty is to provide services necessary to ensure the survival of homeless people, services necessary to allow a decent human existence, or services necessary to assist the homeless to better their current situation and break the cycle of homelessness.

By referring to evidence taken at the liability stage, the court determines the nature and level of need that is not being met by the government. As part of its liability analysis the court should determine which of the required services the government is either failing to provide or providing in insufficient quality or quantity.

Once the court has determined what the law requires and how the government is failing to satisfy its legal duties, the court should consider remedial alternatives that will fill the service gap left by the government's noncompliance. If the parties have not presented evidence regarding an appropriate remedy during the trial, the court should conduct a separate hearing on the issue of relief. Guided by equitable principles, the court will perform the functions ordinarily performed by executive or legislative officials. In the words of the Supreme Court, the court will have to fashion a remedy by "adjusting and reconciling public and private needs."[214] The court should receive evidence on the remedial question from both plaintiffs and defendants, and in some cases, from court-appointed experts and the public. The court should also consider appointing a special master to hear the evidence and make recommendations regarding the appropriate remedy. The court will have to decide many issues if it seeks to impose a detailed remedy compelling a government to satisfy its duty to aid the homeless, but

213. *See supra* note 201 and accompanying text.

214. Brown v. Board of Educ., 349 U.S. 294, 300 (1955).

with sufficient evidentiary resources, there is no reason the court cannot make these decisions in order to ensure life, health, and safety to homeless persons.

CONCLUSION

Litigation under state poor laws can provide meaningful relief for the homeless. Many state constitutional and statutory provisions create mandatory duties to relieve or assist the poor. At a minimum, those duties must be interpreted to encompass the basic need of the homeless—shelter.

Although government entitles and officials may argue that the performance of their duties involves nonjusticiable political questions, courts should conclude that poor laws create enforceable individual rights. Even when the performance of governmental duties to the poor involves the exercise of discretion, courts can compel compliance in one of two ways. When the government is completely failing to provide shelter or other required services, the court can simply order the government to provide the services without specifying the manner in which it must provide them. When the government is complying in part by providing shelter or other services in insufficient quantity or quality, the court can order full compliance if the exercise of discretion is not exclusively committed to the executive or legislative branch of government and the conduct of the responsible officials is an abuse of discretion.

While courts possess extensive remedial powers, they should exercise those powers with caution. Courts should avoid relief in homeless cases that is broader than necessary to meet the violation, and should allow the government to make the discretionary choices it was originally entrusted to make. When necessary, however, courts have both the authority and the competence to devise detailed remedial schemes to accomplish the objectives of the law and provide meaningful relief for the homeless.